

College Coaching Contracts: A Practical Perspective

Martin J. Greenberg
Marquette University Law School

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Martin J. Greenberg, *College Coaching Contracts: A Practical Perspective*, 1 Marq. Sports L. J. 207 (1991)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol1/iss2/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

COLLEGE COACHING CONTRACTS: A PRACTICAL PERSPECTIVE*

MARTIN J. GREENBERG

I. COLLEGE COACHES CONTRACTS

A. Introduction - "The Environment"

When is a contract not a contract? Where is job security as fleeting as the last seconds of a basketball victory? In what field is an employment contract broken as easily as made? None other than in the world of college coaching. At the commencement of the 1988-89 college basketball season, a total of 39 schools or approximately 13.4% of the 294 Division I institutions had new coaches at the helm.¹ This compares with an all-time high of 66 new coaches or approximately 22.8% of Division I schools during the previous season.² During the 1980s, approximately 384 coaching changes have taken place in Division I schools.³ Approximately 53 basketball coaches have changed jobs since the end of the 1989-90 season.⁴ The American Football Coaches Association indicates that head football coaches remain in NCAA Division I-A football programs for an average of only 2.8 years.⁵ The number of coaches employed at the 279 schools that have played in Division I Men's Basketball for all of the past 15 seasons include:

Copyright 1991 by Martin J. Greenberg.

* This article will appear as a chapter in Martin J. Greenberg's upcoming book to be published by The Michie Company. This two volume practical guide to sports law, which is scheduled for release in the spring of 1992, is intended to serve not just sports law attorneys but all those who find themselves confronted with legal issues in sport.

1. Basketball Weekly, May 2, 1989, at 4, col. 1.

2. *Id.*

3. *Id.*

4. *The Coaching Game: Turnovers Tell The Story How Long They Stay*, U.S.A. Today, Mar. 26, 1990, at 10C, col. 1. Indicated is the number of Division I Basketball coaches hired in the past 10 years according to Basketball Weekly, May 1, 1990, at 15, col. 2.

1989-90	53
1988-89	42
1987-88	39
1986-87	66
1985-86	56
1984-85	26
1983-84	38
1982-83	37
1981-82	37
1980-81	42

5. M. SPERBER, COLLEGE SPORTS, INC. 158 (1990). According to Sperber,

10 schools employed 6 coaches (average tenure, 2.5 years)
30 schools employ 5 coaches (3.0 years)
68 schools employed 4 coaches (3.75 years)
102 schools employed 3 coaches (5.0 years)
45 schools employed 2 coaches (7.5 years)
24 schools employed 1 coach (15.0 years)⁶

Why is job movement, contract jumping, retirement and firing so characteristic of college coaching? The Job Related Almanac indicates that an NCAA basketball coach has the 15th most stressful job out of the 260 jobs listed.⁷ A coach is defined as "one who trains intensively by instruction, demonstration, and practice."⁸ This definition certainly does not recognize the current job environment and employment conditions of the modern day coach.

The coach of the 1990s is not only required to be an instructor, but also a fundraiser, recruiter, academic coordinator, public figure, budget director, television and radio personality, alumni glad hander, and whatever else the university's athletic director or president may direct the coach to do in the best interest of the university's athletic program.

Indeed, today's college coach has become a prominent public figure. In many instances, the coach's name recognition is greater than that of the university president. In some cases, a coach who exhibits interest in employment elsewhere other than old "U" may cause a statewide crisis. For instance, when Bobby Knight, head basketball coach of Indiana University, entertained an offer of employment from the University of New Mexico, Knight's actions, and the resultant public furor became a featured story on network news and even drew the attention of the Indiana legislators.

Stress and the changing nature of the job may be the primary cause for job movement. Some coaches indicate that "they spend less than 20% of their working time actually coaching on the court or the field."⁹ Jack Hartman, former men's basketball mentor at Kansas State University who had coached for 35 years stated, "[t]he fun was actual on-court coaching, and working with a kid on and off the court and seeing him grow as a person.

Even when other divisions are factored in, the average stay is only 6.5 years. Similar statistics used to prevail for men's basketball coaches, but now in Division I, like molecules being heated by NCAA tourney and TV fever, coaches are moving increasingly fast and have surpassed the football rate. Almost 50 percent of all head basketball coaches changed jobs between 1986 and 1989.

6. U.S.A Today, Mar. 28, 1990, at 10C, col. 1

7. Basketball Weekly, May 2, 1989 at 4, col. 4.

8. WEBSTER'S NEW WORLD DICTIONARY 118 (2d ed. 1983).

9. Chronicle of Higher Education, Mar. 19, 1986, at 39, 40, col. 2.

That's what attracted us originally and has become obscured by all the other time demands."¹⁰

In addition to the pressures of college athletics, the coach now faces the added pressures of the public concern involving student eligibility, academic progress and, most recently, the posting and disclosure of grades and graduation rates of student athletes.

The NCAA has passed legislation requiring member institutions to publish graduation rates for student-athletes making them available to the public.¹¹ The legislation calls for disclosure of graduation rates for the entire student body and for student-athletes to the NCAA. The athlete's data must be broken down by sports and in football and basketball broken down by race. Thus, the information on graduation rates that have been disclosed to the NCAA for many years will now be available to the public. The first reporting date is October, 1991, at which time the graduation rates for the last four years will be disclosed.¹²

The Chronicle of Higher Education recently published a survey which included responses from 262 of 295 Division I schools. It took freshmen going into school in fall of 1984 and counted how many had graduated by August 1989. The survey indicates:

Some good: The five-year graduation rate for all Division I athletes entering school in 1984 was 56.1%, far ahead of the 47.9% graduation rate for all students in general.

Some bad: The graduation rate for football players at Division I-A schools was only 42.5%, including 32.2% by the Southeastern Conference, 32.5% by the Southwest and 39.4% by the Big Eight.

Some ugly: The graduation rate for basketball players in Division I was only 39%, and only 31.9% at schools that are Division I in basketball and Division I-A in football. This includes 14% by the Southeastern Conference, 18.9% by the Big West Conference, whose rate for football players was 23.8%.¹³

The article concludes that, "The overall signal is undeniable; schools are much more lax in graduating football and basketball players than other athletes. There is a crisis of non-graduated students in the sports of big names and big money."¹⁴

10. *Id.*

11. 1990-1991 NCAA DIVISION I BYLAWS. The 84th NCAA Convention adopted this provision effective 1/10/90 for data collection, 10/1/91 for Division I and 7/1/93 for Division II.

12. *Id.*

13. Chronicle of Higher Education, Mar. 27, 1991, at A1 and A38.

14. *Id.*

Because of public disclosure, coaches can no longer just be satisfied with winning. Coaches cannot afford to ignore when their star athlete misses his chemistry class or threatens to drop out of school.

College sports has become a big business with high financial stakes. If the coach is not bringing in enough revenue, or is not perceived positively by the alumni or public, a university may be forced to terminate his employment for fear of losing large amounts of money. Coach Rich Haddad was fired as the basketball coach of Jacksonville, concluding a 6-21 season. "Winning is the bottom line."¹⁵ Added Haddad, "Schools are looking for coaches who run clean programs, graduate their players and win big. If you stumble in any area, you're in trouble. But winning big is the big factor. And that translates into money."¹⁶ But, even winning doesn't guarantee job security. J.D. Barnett had a winning record including two NCAA tournament appearances, a clean slate with the NCAA and a rollover five year contract at Tulsa when he joined the roll call of fired basketball coaches in March of 1991. "Where did Barnett go wrong? Tulsa Athletic Director Rick Dickson said Barnett was fired for not making enough money for the school. He cited dwindling attendance, contributions and season ticket sales. He also cited the turnover in the assistant coaches and the student-athletes not completing his program."¹⁷ Twenty-four College Football Association teams that played in 1989-90 bowl games earned a total of \$33 million.¹⁸ The 1990 NCAA Men's Basketball Final Four participants, Arkansas, Duke, Georgia Tech, and UNLV, earned an estimated 1.23 million each for their participation in the Tournament.¹⁹ Further, the advent of

15. U.S.A. Today, Mar. 27, 1991, at 4C, col. 4.

16. *Id.*

17. *Id.*

18. The Palm Beach Post, Apr. 30, 1989, at 8C, col. 6.

19. Symonds, *March Madness is Getting Even Crazier*, BUS. WK., Apr. 2, 1990, at 102.

This year, the NCAA expects to clear about \$65 million on tournament receipts of \$72.3 million. Next year, the tournament could easily gross \$1230 million, thus exacerbating the problem. The NCAA gets 40% of this year's \$65 million, while the other 60% goes to the 64 colleges in the tourney. The 32 teams eliminated in the first round go home with \$286,500 apiece; teams that go to the Final Four each get \$1.4 million.

Basketball Weekly, May 2, 1989, at 4, col. —; T.V. revenue from the Final Four in 1970: \$500,000; 1973: \$1.1 million; 1979: \$5.2 million; 1980: \$8.9 million; 1981: \$10.3 million; 1982: \$14.6 million; 1987: \$36.6 million; 1988: \$57.8 million;

An NCAA committee is working on a plan that would change the way basketball tournament money is distributed. The new plan would, in part, reward schools for the number of sports sponsored, participation in NCAA championships the last three years and the number of grants-in-aid provided, rather than simply on progression through the tournament. Hearings will be held in San Francisco, Chicago and Arlington, Va., June 14, to explain the plan. If implemented, it would represent a drastic change from the current payoff system. A look at how round-by-round rewards have grown:

major television and cable network contracts for the right to broadcast these events has created even more revenue for the NCAA and its constituent universities. CBS has agreed to pay the NCAA \$143 million for television rights to the NCAA College Basketball Tournament from 1991 to 1997.²⁰ Before Notre Dame left the CFA (College Football Association), ABC agreed to pay \$210 million for five years for the right to telecast CFA games.²¹ In 1989, ABC paid \$11.8 million for the rights fees to telecast the Rose Bowl with each team receiving approximately \$6.3 million.²² Today's coaches are faced with a win at any cost dilemma. The pressure to generate revenues from television, gate receipts, alumni donations and tournament participation has put the bottom line or balance sheet psychology on an equal basis with "wins and losses."

Year	Team	Round 1	Round 2	Regional Semifinal	Regional	Final 4
1970	25	8,263	8,263	24,788	24,788	49,576
1975	32	22,230	22,230	66,691	66,691	133,381
1980	48	81,594	81,594	203,986	203,986	326,378
1985	64	150,380	300,760	451,139	601,510	751,899
1990*	64	286,500	573,000	859,500	1,146,000	1,432,500

*Estimated, final figures should be available by June 27.

Source: NCAA

NCAA Basketball Tournament Pay Outs Grow, U.S.A. Today, May 31, 1990, at 10C, col. 5.

20. U.S.A. Today, December 14, 1989, at 12C, col. —; Sports Industry News, March 2, 1990, at 67, col. 1; CBS will televise the Division I Men's College Basketball Tournament and fifteen other championships, including the Men's College Basketball Tournament for a seven year period from 1991 to 1997. The \$1 billion dollar deal represents approximately \$143 million a year. This package is worth two and one half times the networks' previous television deal which garnered \$55.3 million per year. The annual rights fee in 1980 was \$9.3 million (NBA network), in 1982, \$13.3 million (CBS network), and in 1985 \$55.3 (CBS network).

21. E. Comte, *College Football Focus: Going Regional With ABC*, Sporting News, Feb. 5, 1990, at 47. Details of the Notre Dame NBC television agreement: All home football games, six a year from 1991-95 to be telecast nationally on NBC. The package will begin with a Sept. 7, 1991 visit by Indiana. The Irish will play at home against 16 opponents:

Three games each: Southern California, Boston College, Navy;

Two: Michigan, Michigan State, Pittsburgh, Penn State, Purdue, Stanford, Brigham Young, Northwestern;

One: Indiana, Tennessee, Air Force, Vanderbilt, Texas.

Revenue is \$30 million-split evenly between Notre Dame and visiting schools. ABC or ESPN retain rights, under their 1991-95 deal with the College Football Association, to broadcast games when Notre Dame is playing on the road. ABC aired two Notre Dame games in 1989 under its Big Ten-Pacific 10 contracts; CBS three, under its current CFA deal; ESPN two, under the CFA cable package; SportsChannel America aired two games on cable. The South Bend, Ind., NBC affiliate, WNDU, owned by Notre Dame, will continue to telecast all sold-out home games, and some road games. SportsChannel America retains tape-delay TV rights.

22. U.S.A. Today, Nov. 5, 1990, at 2C, col.—.

The student athlete of today may be a different athlete than of years ago. The reverence paid to the coach as a father-figure or surrogate parent may no longer be. Recent revolts by players have forced coaches out of their jobs. For instance, San Jose University in January of 1989, experienced a rebellion among its basketball players. The players announced they would not play for the team unless coach Bill Berry was fired.²³ They accused the coach of verbal abuse and mental cruelty.²⁴ A players rebellion also occurred in February of 1990 at Drake University when Coach Tom Abatemarco was reassigned to other athletic department duties 24-hours after the players stated that they would no longer practice or play for Abatemarco because of alleged verbal and mental abuse. Drake University

A Look at the Postseason Bowls

<u>Bowl</u>	<u>Date</u>	<u>Time</u>	<u>TV</u>	<u>Payout</u>	<u>Location</u>
California Raisin	Dec. 8	4 p.m.	SportChannel	\$275,000	Fresno
Poulan/Weed Eater					
Independence	Dec. 15	8 p.m.	Mizlou	600,000	Shreveport
Eagle/Aloha	Dec. 25	3:30 p.m.	ABC	600,000	Honolulu
Liberty	Dec. 27	8 p.m.	ESPN	1 million	Memphis
Blockbuster	Dec. 28	8 p.m.	Raycom	1.25 mill.+	Miami
All American	Dec. 28	7:30 p.m.	ESPN	600,000	Birmingham
Peach	Dec. 29	12:30 p.m.	ABC	900,000	Atlanta
Anaheim Freedom	Dec. 29	8 p.m.	Raycom	600,000	Anaheim
Sea World Holiday	Dec. 29	7:30 p.m.	ESPN	1.2 mill.	San Diego
John Hancock	Dec. 31	2:30 p.m.	CBS	750,000+	El Paso
Domino's Pizza Copper	Dec. 31	5 p.m.	TBS	600,000	Tucson
Mazda Gator	Jan. 1	11:30 p.m.	ESPN	1.2 mill.	Jacksonville
Hall of Fame	Jan. 1	1 p.m.	NBC	1 mill.	Tampa
Florida Citrus	Jan. 1	1:30 p.m.	ABC	1.3 mill.	Orlando
Mobil Cotton	Jan. 1	1:30 p.m.	CBS	3 mill.	Dallas
Sunkist Fiesta	Jan. 1	4:30 p.m.	NBC	2.5 mill.+	Tempe
Rose	Jan. 1	5 p.m.	ABC	? mill.	Pasadena
Federal Express Orange	Jan. 1	8 p.m.	NBC	4.2 mill.	Miami
USF & G Sugar	Jan. 1	8:30 p.m.	ABC	3.25 mill.	New Orleans

See also, *The Sports Industry News*, Aug. 5, 1988, at 247, which provides:

<u>Bowl</u>	<u>Network</u>	<u>Payment</u>	<u>Payment Per Team - 1988</u>	<u>Payment Per Team</u>
Rose	ABC	\$11.8 million	\$5.8 million	\$6.3 million
Orange	ABC	5.0 million	2.5 million	3.5 million
Sugar	ABC	2.5 million	2.6 million	2.7 million
Cotton	CBS	3.4 million	2.4 million	2.5 million
Fiesta	NBC	2.5 million	2.0 million	2.5 million
Citrus	ABC	500,000/barter	1.0 million	1.1 million
Hall of Fame	ABC	barter	\$800,000	1.0 million

23. *Chronicle of Higher Education*, Feb. 1, 1989, at A31, col. 5.

24. *Id.*

officials denied that they let the basketball players take control over the program by giving in to player demands.²⁵

With the rise of college sports as a big business, college coaching has become a game of high stakes where money talks. The position of head coach may offer not only a salary with institutional fringe benefits, but additional compensation opportunities which are generally referred to as the "package." The package might include shoe, apparel and equipment endorsements, television and radio shows, speaking engagements, personal or public appearances, and summer instructional camps. In addition, the job may also mean such related perquisites as housing, insurance premiums, membership in health and country clubs, financial gifts from alumni and boosters, business opportunities, and the use or the gift of automobiles.

For instance, the income of Vince Dooley, Georgia's athletic director and football coach, and the income of Hugh Durham, Georgia's basketball coach illustrate the types of compensation packages in college athletics:

1. Vince Dooley, Athletic Director and Head Football Coach income from sources outside of University of Georgia Athletic Association (UGA).

\$103,000	TV and radio shows
15,000	Endorsement contract with shoe company
12,000	Speaking engagements
5,250	Summer camps
2,406.12	Endorsement contracts with various athletic equipment and clothing companies
\$137,656.12	SUBTOTAL

Income provided by UGA Athletic Association

\$ Value (unknown)	Home (provided by Athletic Association)
\$ Value (unknown)	Luxury automobile
\$ 95,000	Salary
\$ 4,500	Allowance for incidental expenses
\$ 26,000	Premium on deferred-income annuity
\$ 125,500	SUBTOTAL
\$ 263,156.12	TOTAL SPORTS-RELATED INCOME (without value of house and car)

2. Hugh Durham, Men's Basketball Coach

25. B. Loop, *Administrators Deny Basketball Players' Staged Coup*, United Press International, Feb. 8, 1990.

Income from sources outside of UGA Athletic Association

\$ 73,000	TV and radio shows
\$ 40,000	Speaking engagements
\$ 35,000	Endorsement contract with shoe manufacturer
\$ 3,000	Endorsement contract with basketball manufacturer
\$ 1,500	Endorsement contract with uniform manufacturer
\$ 3,600	Housing subsidy
\$ Value	Basketball camps (unreported)
\$ 156,100	SUBTOTAL (plus any unreported income)

Income provided to Durham by UGA Athletic Association

\$ 75,000	Salary
\$ Value	Luxury automobile
\$ 75,000	SUBTOTAL
\$ 231,000	TOTAL SPORTS-RELATED INCOME (without value of car) ²⁶

Because of the lack of job security in coaching, and the amount of money paid to the coaches for their services, meticulously drafted employment contracts have become a necessity for both the coach and the university. According to Judson Graves,

College athletics is big business. Whatever else they may be—master strategists, charismatic inspirers of young athletes, or national celebrities—today's college athletic coaches are big businessmen. In the high-stakes, win at all costs atmosphere of major college athletics, job security for coaches can be as fleeting as last Saturday's victory, and complex, tightly drawn employment contracts have become a necessity for those coaches with enough negotiating leverage to obtain them. These relatively new entrants to the business world operate in a volatile atmosphere in which hirings and firings often occur in rapid sequence, and hard legal questions are being raised about the proper methods of enforcing their employment contracts when breaches occur.²⁷

This article is organized as a practical guide for those representing the coach or university when drafting an employment contract. The commentary will focus on Division I coaches' contracts, but the contents herein also apply to Divisions II and III coaches' contracts. Two essential areas will be discussed in order that a tightly drawn employment contract can be created. First, the practitioner must understand the effect of the law on the employment contract in a sports industry context. General contract principles regarding coaching contracts, the implications of *Rodgers v. Georgia*

26. Note, *State Open Records Acts and the NCAA Bylaw Requiring Coaches to Disclose Their "Athletically-Related" Outside Income: Emptying the Coaches' Pocket For Public Inspection*, 16 J. OF C & U.L. 497, 513 n.104 (1990).

27. Graves, *Coaches in the Courtroom*, 12 J. OF C. & U.L. 545, 545 (1986).

Tech. Athletic Ass'n.,²⁸ NCAA rules, and the effect of state open record laws on the coaching contract will be discussed. Second, this chapter will discuss and provide examples of clauses that may be contained in the coach's contract. Employment contracts will vary depending upon the factual circumstance because of the divergent goals and strategies of the university and coach. However, a discussion of the important clauses that are generally found in coaches contracts is the starting point for the practitioner when drafting the coaching contract. The clauses used in this chapter originated from actual coaches' contracts, "The Model University Coaching Contract' (MCC): A Better Starting Point For Your Next Negotiation,"²⁹ and "Coaching Contracts: Some Suggestions on Your Next Coaching Contract Negotiation And Report From Our Survey."³⁰ When reviewing MCC clauses, one should note that the MCC is university oriented and drafted for purposes of protecting the university and not the coach. Coaches' contracts can take many forms, unlike the standard player contracts utilized in the NBA, NFL, NHL and Major League Baseball, varying from a simple letter of appointment, to a letter agreement, to a standard university contract or to a fully negotiated contract covering many of the legal nuances of this unique position.

B. Knowing the Law

As a general principle of law, a promise to tender personal services will not be specifically enforced by an affirmative decree. This is so primarily because courts will not force a person to engage in activity against his will, regardless of a contractual obligation to perform. When this rule is applied in the area of coaches contracts, the result is that neither the university nor the court can require a coach to work, even if the coach is contractually bound to do so. Similarly, a coach cannot force a university to allow him to work if the university decides to terminate his position or to replace him with another coach. The university, therefore, may remove the coach from his position at any time, with or without a valid reason. However, the university may have to compensate the coach with monetary damages if the coach challenges the premature contract termination.

In *Coaches in the Courtroom*, Judson Graves states that in the context of coaching contracts, the relationship between the university and the coach

28. *Rodgers v. Georgia Tech Athletic Association*, 166 Ga. App. 156, 303 S.E.2d 467 (1983).

29. Stoner & Nogay, *The Model University Coaching Contract (MCC): A Better Starting Point For Your Next Negotiation*, 16 J. OF C. & U.L. 43, 43 (1989).

30. Stoner, *Coaching Contracts: Some Suggestions on Your Next Coaching Contract Negotiation and Report from our Survey*, 27th Annual NACUA Conference (June 23-26, 1987).

becomes somewhat unbalanced, in that while the coach has clear contractual remedies against the university for breach of contract, the same may not be true if the coach decides to terminate performance.³¹ Graves believes that the advantage here lies with the coach "who can breach the contract and leave the relationship with virtual impunity. . . ."³² Graves states that the problem is even more acute when the university, in attempting to enforce its contract, tries to prove precisely how, in monetary terms, it has been damaged by the coach's termination of the contract.³³ According to Graves:

In theory, at least, an employer is clearly entitled to bring an action for damages against any employee in breach, and coaches are no exception. In such cases the recoverable damages are normally measured by the cost to the employer of obtaining equivalent services elsewhere, plus consequential damages. Some cases indicated that in assessing such damages, the market value of the lost services must be measured against that of the substitute services procured by the employer to remedy the breach.³⁴

Although these criteria may seem simple and reasonable, a judge or jury may find it impossible to determine the market value of coaches' contracts. In addition, most premature terminations are met with animosity on at least one side, and litigation could serve merely to prolong those negative public relations and cast a shadow over the institution's athletic program for years. It may provide difficult to estimate - or compensate for - the vast array of payments and fringe benefits a coach may have been receiving prior to the breach. For these reasons, many institutions avoid litigation, even if the coach is the breaching party.³⁵ Graves concludes that: "As a result, most employees, and certainly most coaches, have historically been able to leave their employment virtually at will despite their prior contractual commitments."³⁶

On the other hand, a university may attempt to obtain equitable relief by acquiring an injunction to prohibit a contract "jumping" coach from working for another entity. For example, in 1973, Charles "Chuck" Fairbanks contracted with the New England Patriots, to act as its general manager and head coach. A later agreement specified that employment should continue until January, 1983, and also read:

31. Graves, *supra* note 27, at 548.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 549.

36. Graves, *supra* note 27, at 549.

- 10(b) Fairbanks shall not render services directly connected with football during the period of his employment other than for the Patriots except with the express written permission of the Patriots, which permission shall not be unreasonably withheld.
- (d) Fairbanks shall not render services to another entity not connected with football during the period of employment except with the express written permission of the Patriots, which permission shall not be unreasonably withheld.³⁷

In 1978, Fairbanks was approached by persons affiliated with the University of Colorado who tried to convince Fairbanks to leave the Patriots and become the Colorado head football coach. The Patriots sought a court injunction enjoining Colorado from contracting with Fairbanks while he was still under contract with the Patriots.³⁸ The District Court in Colorado entered a preliminary injunction enjoining the University of Colorado, its regents, president, athletic director, and certain fans from contacting Fairbanks for the purpose of hiring him for the University.³⁹ On Appeal, the first district upheld the preliminary injunction forbidding Colorado from soliciting Fairbanks' services reasoning that Fairbanks' services were unique and the loss of his services would cause irreparable harm to the Patriots, and money damages would be difficult to determine.⁴⁰ The court also held that the contractual provisions that required Fairbanks, while under contract with the Patriots, to refrain from contracting for "services directly connected with football. . .[or with] another entity not connected with football," covered entities not in direct competition with the Patriots.⁴¹ Therefore, the clause also prohibited Fairbanks from entering into an employment agreement with the University of Colorado.

A similar situation arose regarding Michigan State University's attempt to hire George Perles, then under contract with the Philadelphia Stars of the former United States Football League. In response to the university's action, the Stars sued the university for \$1 million.⁴² The case ultimately ended in a settlement, with the university paying \$175,000 in order to obtain Perles' services and protect itself from legal liability.⁴³

37. *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1998 n.1 (1st Cir. 1979).

38. *Id.* at 1200.

39. *Id.* at 1198.

40. *Id.* at 1198, 1199.

41. *Id.*

42. M. SPERBER, *supra* note 5, at 164, 165.

43. *Id.* at 165.

In many instances, a coach's contract will contain a unique services clause, to protect the university from a breaching coach. By agreeing to this clause, the coach acknowledges that he has a special, unique and exceptional skill, and that the university's need for continuity in its coaching - as well as any further acquisition of coaching experience - will reflect that uniqueness. The contract will also require the coach to agree that the loss of his services, prior to the expiration of the contractual term, and without the university approval, will cause an inestimable loss to the university which cannot be fairly or adequately compensated for by money damages. Finally, the coach will be required to promise not to accept employment under any circumstances as a coach at any other institution, or with any professional league, or with any other competing entity without first obtaining permission from the university.

These clauses are necessary because a university may be unable to obtain a negative injunction due to the "difficulty of proving a coach exceptional, difficulty in proving irreplaceability or irreparable harm, difficulty in proving money damages and difficulty in proving that the coach would not be unreasonably burdened."⁴⁴

Because of the university's inability to force the coach to work, and because of the possibility of protracted litigation, adverse publicity, a cloud over the athletic department, and presumably a relationship that has deteriorated, most universities will let their restless or ambitious coach go without further ado. Unless, of course, the contract contains some type of financial "buy out" or "release" clause.⁴⁵

However, when the coach's contract is terminated by a university prior to its expiration, the courts have generally allowed the coach to recover money damages, measured by the "full-rate of contract compensation." The coach's right to receive this compensation may be reduced if a mitigation of damages clause in the contract states that the coach's relief will be offset if he obtains other employment or has earnings from a new job.

Judsen Graves concludes that the victimized coach has a remedy in the form of full monetary compensation:

Most institutions recognize their continuing liability under the contract and either continue to pay the coach through the contract term (even though there are no employment duties) or "buy out" the contract for a lump sum. It has been suggested that a lump sum buy-out at the time of the termination, based on the present value of

44. Stoner, *supra* note 30, at 6.

45. A "release" clause is defined as a provision "discharg[ing] a claim one has against another." BLACK'S LAW DICTIONARY 1159 (5th ed. 1979).

future payments to come due, is the proper measure of damages in such a situation rather than the installment method. . . and this method has been used with many coaches. The theory is that since the breach is complete upon contract termination, complete damages are then due as well. The principle is the same, however, and the adequacy of the remedy clears under either measure.⁴⁶

The coach's contract today is no longer monetarily a simple matter of salary and fringe benefits provided by the university. The total compensation received by the coach commonly referred to as the "package," may include those financial opportunities normally attendant to the position of head coach such as "anticipated earnings" from television, radio shows, athletic summer camps, product endorsements or similar personal appearance opportunities, as well as certain incidental benefits and perquisites sometime bestowed by alumni and boosters such as a free car, free housing, life insurance, lodging, complimentary club memberships, trust funds, annuities, complimentary athletic tickets, and attractive investment and business opportunities.⁴⁷

The component parts of the package may flow from a variety of sources, ". . . some of which may provide their component part pursuant to an obligation (such as the employer's obligation to pay salary), while others may provide elements of the package under no legal obligation, but simply out of a desire to aid the athletic program or curry favor with the celebrity coach."⁴⁸

The legal question becomes to what extent may a terminated coach recover consequential loss of his collateral opportunities even when the university did not agree to be contractually liable for them, or their aggregate value is substantially in excess of the coach's basic salary and university provided fringe benefits.⁴⁹

C. *Rodger v. Georgia Tech. Athletic Association*⁵⁰

Rodgers v. Georgia Tech Athletic Association,⁵¹ is the leading case as to whether a coach may recover monetary damages for breach of contract including consequential loss of collateral opportunities. Franklin C. "Pepper" Rodgers was removed by Georgia Tech from his head football coaching position on December 18, 1979, two years before the expiration of

46. Graves, *supra* note 27, at 550.

47. *Id.* at 551.

48. *Id.* at 551.

49. *Id.* at 551.

50. *Rodgers*, 166 Ga. App. 156, 303 S.E.2d 457 (1983).

51. *Id.*

his contract. Rodgers' initial contract was in the form of a letter dated April 20, 1977 with the defendant, a non-profit corporate entity separate from the university, but responsible for the university's varsity's athletic program.

Rodgers' contract provided that in addition to regular compensation, as an employee of the Association, you would be entitled "to various insurance and pension benefits and perquisites" as you become eligible therefor.⁵² After termination, the Association had continued to pay Rodgers his normal monthly salary plus pension-insurance benefits.⁵³ Rodgers suit which was for damages in excess of \$496,000.00 was for "perquisites" over and above the normal compensation covered under his coaching contract.⁵⁴

Rodgers argued he was entitled to twenty-nine perquisites for which he grouped into two categories.⁵⁵ The first category included items provided directly to him by the Association but discontinued when he was fired.⁵⁶ The second category included items provided through sources other than the Association by virtue of his position as head football coach.⁵⁷ What follows is a list of those perquisites as included in the appendix to the case:

- A. Benefits and Perquisites Received by Rodgers *Directly* from Georgia Tech Athletic Association.
- (1) gas, oil, maintenance, repairs, other automobile expenses;
 - (2) automobile liability and collision insurance;
 - (3) general expense money;
 - (4) meals available at the Georgia Tech training table;
 - (5) eight season tickets to Georgia Tech home football games during fall of 1980 and 1981;
 - (6) two reserved booths, consisting of approximately 40 seats at Georgia Tech home football games during fall of 1980 and 1981;
 - (7) six season tickets to Georgia Tech home basketball games for 1980 and 1981;
 - (8) four season tickets to Atlanta Falcon home football games for 1980 and 1981;
 - (9) four game tickets to each out-of-town Georgia Tech football game during fall of 1980 and 1981;
 - (10) pocket money at each home football game during fall of 1980 and 1981;

52. *Id.* at —, 303 S.E.2d at 469.

53. *Id.* at —, 303 S.E.2d at 470.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

- (11) pocket money at each out-of-town Georgia Tech football game during fall of 1980 and 1981;
 - (12) parking privileges at all Georgia Tech home sporting events;
 - (13) the services of a secretary;
 - (14) the services of an administrative assistant;
 - (15) the cost of admission to Georgia Tech home baseball games during spring of 1980 and 1981;
 - (16) the cost of trips to football coaches' conventions, clinics, and meetings and to observe football practice sessions of professional and college football teams;
 - (17) initiation fee, dues, monthly bills, and cost of membership at the Capital City Club;
 - (18) initiation fee, dues, monthly bills, and cost of membership at the Cherokee County Club;
 - (19) initiation fee and dues at the East Lake County Club.
- B. Benefits and Perquisites Received by Rodgers from Sources *Other Than* the Georgia Tech Athletic Association by Virtue of Being Head Coach of Football.
- (1) profits from Rodgers' television football show, "The Pepper Rodgers Show," on Station WSB-TV in Atlanta for the fall of 1980 and 1981;
 - (2) profits from Rodgers' radio football show on Station WGST in Atlanta for the fall of 1980 and 1981;
 - (3) use of a new Cadillac automobile during 1980 and 1981;
 - (4) profits from Rodgers' summer football camp, known as the "Pepper Rodgers Football School," for June 1980 and June 1981;
 - (5) financial gifts from alumni and supporters of Georgia Tech for 1980 and 1981;
 - (6) lodging at any of the Holiday Inns owned by Topeka Inn Management, Inc. of Topeka, Kansas, for the time period from December 18, 1979 through December 31, 1981;
 - (7) the cost of membership to Terminus International Tennis Club in Atlanta for 1980 and 1981;
 - (8) individual game tickets to Hawks basketball and Braves baseball games during 1980 and 1981 seasons;
 - (9) housing for Rodgers and his family in Atlanta for the period from December 18, 1979 through December 31, 1981;

- (10) the cost of premiums of a \$400,000.00 policy on the life of Rodgers for the time period from December 18, 1979 through December 31, 1981.⁵⁸

These perquisites were not defined in Pepper Rodgers' contract. The Association moved for summary judgment arguing that (1) it had met its contractual obligation by continuing to pay Rodgers as required under the contract, (2) it could not be held responsible for Rodgers' collateral opportunities with third party providers, or (3) it could not be held liable for actions of individuals not related to the contract who decided to cease providing Rodgers gratuitous items as a result of his position as head coach.⁵⁹

The trial court granted the Association's motion for summary judgment dismissing Rodgers' suit in its entirety. According to Judson Graves:

Had this decision gone unchallenged, it would have essentially preserved the traditional view described previously, by which the breaching employer's liability is limited to the amount of direct compensation and related compensatory benefits (such as pension contributions, for example) which the employee would have received for the balance of the term of employment had the contract not been terminated early.⁶⁰

Rodgers' appeal, and the appellate decision "broke new ground in Georgia and that may help litigants elsewhere do the same, in expanding the elements of damages potentially recoverable in these coaches' contract cases."⁶¹

The Court of Appeals held that some perquisites may be recoverable even though received by Rodgers from third parties not controlled or related to the defendant, if the defendant knew that their loss may be occasioned by relieving Rodgers of his position.⁶² In essence, the Court of Appeals found that perquisites could be recovered if all of the following elements were met:

1. The damages must be traced solely to the breach;
2. The damages must be capable of exact computation;
3. The damages must have arisen naturally and according to the usual course of things from such breach; and
4. The damages must be such as the parties contemplated them as a probable result of the breach.⁶³

58. *Id.* at —, 303 S.E.3d at 474 (1983).

59. *Id.* at —, 303 S.E.2d at 474 (1983).

60. Graves, *supra* note 27, at 553.

61. *Id.*

62. *Rodgers*, 303 S.E.2d at 467, 471.

63. *Id.* at —, 303 S.E.2d at 472, 473.

As result, the Court of Appeals' decision excluded certain damages as a matter of law, while other categories of damages were remanded for a jury trial on the merits.⁶⁴

Of the twenty-nine perquisites that Rodgers tried to collect, eight were thrown out by the court and the other twenty-one were sent to the jury to decide if they were perquisites that were recoverable under the contract and under the elements as previously stated.⁶⁵ Graves states that the importance of the case is that the *Rodgers* decision:

. . . acknowledged that some collateral losses may be recovered if they can be proven with specificity and that in a special class of cases, extraordinary damages may be probably recoverable by an employee if the employment position is such that it provides a unique status and presents the employee with special opportunities to further one's name and reputation, as well as to earn money substantially over and above salary and fringe benefits.⁶⁶

The case of *McLaughlin v. Union-Leader Corp.*⁶⁷, also provides guidance for the construction of personal service contracts. *McLaughlin* involved a five year personal service contract of an advertising manager who worked for a New Hampshire newspaper. After the execution of the agreement, the newspaper installed a new advertising manager and placed McLaughlin on an "indefinite leave of absence" with pay. When McLaughlin sued for breach of contract, the newspaper stopped paying his salary, asserting that McLaughlin had breached the contract by rendering inadequate performance. The jury rejected the newspaper's argument and awarded McLaughlin a substantial verdict which was upheld on appeal.⁶⁸

The turning point of the case was when the court recognized a breach on the part of the newspaper, both in its refusal to pay McLaughlin's salary and its denial of the position he had contracted to receive.⁶⁹ To support its holding, the court cited Section 433 of the Restatement of Agency:

If the [agent] . . . is to receive a fixed salary, a promise by the principal to furnish him with work is inferred from a promise to the employee only if it is found that the anticipated benefit to the agent from doing the work is a material part of the advantage to be received by him from the employment. This anticipated benefit may be the acquisition of skill or reputation by the employee or the acquisition of subsidiary pecuniary advantages, as in the case of the em-

64. *Id.* at —, 303 S.E.2d at 474.

65. *Id.* at —, 303 S.E.2d at 474, 475.

66. Graves, *supra* note 27, at 554.

67. 99 N.H. 492, 116 A.2d 489 (1955).

68. *Id.* at —, 116 A.2d at 491.

69. *Id.* at —, 116 A.2d at 492.

ployment of public performers whose reputation will be enhanced by their appearance or diminished by their failure to appear beginners in a trade or profession, and those whose compensation is likely to be enhanced by receiving gratuities from outside sources⁷⁰

In holding that the removal of McLaughlin from the position promised to him constituted a separate and distinct breach of his contract, the New Hampshire court took a significant step toward recognizing certain employment positions as including far more than merely the opportunity to work for an employer and earn the agreed upon compensation.

Under this reasoning, preventing an employee ascending to a sufficiently unique employment position (such as that of a coach) could constitute a separate breach of contract, and render the employer liable in damages, even if that employer continued to pay the full contract compensation. Damages in such a situation could flow from the loss of the kinds of "subsidiary pecuniary advantages" and the "gratuities from outside sources" described in the Restatement.⁷¹ In sum, relieving an employee from a position could constitute a compensable loss in addition to the paid compensation to which the employee is clearly entitled under the contract. Moreover, in the area of major college coaching, the value of the lost "subsidiary pecuniary advantages" and "gratuities," such as alumni gifts, television revenues, endorsements, etc., could easily (and often does) exceed the combination of a base salary and related compensation paid by an employer.⁷²

Based on decisions such as *Rodgers*⁷³ and *McLaughlin*⁷⁴, a coach relieved of a position prior to the expiration of the contract can assert that unless the contract specifically precluded such recovery, the coach may be entitled to damages for the monetary losses the employer knew or should have known would be occasioned by a breach. To prevent the occurrence of such damages, the contract should specifically state how collateral business opportunities are to be addressed. The contract should not leave any doubt as to what is within the contemplation of both parties with respect to liability for such items, in the event the relationship is prematurely dissolved.

70. *Id.* at —, 116 A.2d at 492, 493.

71. *Id.*

72. Graves, *supra* note 27, at 555, 556.

73. 166 Ga. App. 156, 303 S.E.2d 467 (1983).

74. 99 N.H. 492, 115 A.2d 489 (1955).

D. National Collegiate Athletic Association (NCAA) Regulations

The drafters of any coach's contract should consider external rules and policies which will have an impact upon the contractual terms. Such external rules and policies will come from the NCAA, the conference to which the university belongs, and the university itself.

Current NCAA rules affecting coach's contracts are as follows:

- a. Article 11, Section 2.1, Stipulation That NCAA Enforcement Provisions Apply:

Contractual agreements or appointments between a coach and a institution shall include the stipulation that a coach who is found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures.⁷⁵

- b. Section 11.2.1.1, Termination of Employment:

Contractual agreements or appointments between a coach and an institution shall include the stipulation that a coach may be terminated if the coach is found to be involved in deliberate and serious violations of NCAA regulations.⁷⁶

- c. Section 11.2.2, Report of Athletically Related Income:

Contract agreements, including letters of appoint, between a full-time or part-time coach and an institution shall include the stipulation that the coach is required to report annually (in writing or orally) all athletically related income and benefits from sources outside of the institution through the athletics director to the institution's chief executive officer. Sources of such income shall include, but are not limited to, the following: (a) Income from annuities; (b) sports camps; (c) housing benefits (including preferential housing arrangements); (c) country-club memberships (e) complimentary ticket sales; (f) television and radio programs, and (g) endorsement or consultation contracts with athletic shoe, apparel or equipment manufacturers.⁷⁷

- d. Section 11.3.2.1, Bona Fide Outside Employment:

A staff member may earn income in addition to the institutional salary by performing services for outside groups, provided the compensation is for additional work actually performed and at a rate commensurate with the going rate in that locality for services of like character, further, such

75. 1991-92 NCAA DIVISION I BYLAWS, Art. 11.2.1.

76. *Id.* at 11.2.1.1.

77. *Id.* at 11.2.2.

outside work must be in conformity with institutional policy and with the approval of the institution.⁷⁸

e. Section 11.3.2.2, Supplemental Pay:

An outside source is prohibited from paying or regularly supplementing an athletics department staff member's annual salary and from arranging to supplement that salary for an unspecified achievement. This includes the donation of cash from outside sources to the institution earmarked for the staff member's salary or supplemental income. It would be permissible for an outside source to donate funds to the institution to be used as determined by the institution, and it would be permissible for the institution, at its sole discretion, to use such funds to pay or supplement a staff member's salary.⁷⁹

f. Section 11.3.2.3, Bonuses for Specific and Extraordinary Achievement:

An institution may permit an outside individual, group or agency to supplement an athletics department staff member's salary with a direct cash payment in recognition of a specific and extraordinary achievement (e.g., contribution during career to the athletics department of the institution, winning a conference or national championship, number of games or meets won during career), provided such a cash supplement is in recognition of a specific achievement and is in conformance with institutional policy.⁸⁰

g. Section 11.3.2.4, Extra Compensation Restriction for Division II and Division III Coaches:

A member institution shall not give extra compensation or remuneration of any sort to any coach conditioned upon or because of the number of games the coach's team wins, or because the team goes to a bowl game or tournament or participates in championships. These limitations on extra compensation to coaches do not apply where enforceable contracts or formal security-of-employment commitments in effect on August 15, 1976, make it impossible to comply with the limitations. These exceptions are continued until existing contracts or formal security-of-employment commitments expire.⁸¹

78. *Id.* at 11.3.2.1.

79. *Id.* at 11.3.2.2.

80. *Id.* at 11.3.2.3.

81. 1991-92 NCAA DIVISION II & III BYLAWS, Art. 11.3.2.4.

- h. Section 11.3.2.5, Endorsement of Commercial Products: Athletic department staff members shall not use, directly or by implication, the institution's name or logo in the endorsement of commercial products or services for personal gain without prior approval from the institution.⁸²
- i. Section 11.3.2.6, Promotional Activities:
A staff member of a member institution's athletics department may not be compensated by an individual or commercial business outside of the institution for employment or assistance in the production, distribution or sale of items (e.g., calendars, pictures, posters, advertisements, cards) bearing the names or pictures of student athletes. The use of the names or pictures of student-athletes on promotional items is limited to institutionally controlled activities involving the sale of official institutional publications and team or individual pictures by the institution. This restriction shall apply even if the promotional item is provided without charge to the public by an outside individual or commercial business that produces or purchases the item through the assistance of institution's staff member.⁸³
- j. Section 11.3.2.7, Compensation in Exchange for Use of Merchandise:
Staff members of a member institution's athletics department shall not accept, prior to receiving approval from the institution's chief executive officer, compensation or gratuities (excluding institutionally administered funds) from an athletics shoe, apparel or equipment manufacturer in exchange for the use of such merchandise during practice or competition by the institution's student-athletes.⁸⁴
- k. Section 11.3.2.8, Compensation for Scheduling Contests/Individual Participation:
Staff members of a member institution's athletics department shall not accept compensation or gratuities for scheduling athletics contests or individual meet participation with another institution or a sponsor of athletics competition. This specifically precludes the acceptance of compensation or gratuities from other institutions, schedule brokers or agents, and television networks or syndicators.⁸⁵

82. 1991-92 NCAA DIVISION I BYLAWS, Art. 11.3.2.6.

83. *Id.* at 11.3.2.6.

84. *Id.* at 11.3.2.7.

85. *Id.* at 11.3.2.8.

At the 1991 NCAA Convention, legislation was passed that would require Division I coaches to be certified on an annual basis in order to contact or evaluate prospects off-campus.⁸⁶ The certification procedures would be established by the NCAA national office and be administered by the respective conference offices.⁸⁷ The certification process would include a standardized national test.⁸⁸ The legislation would go into effect on August 1, 1992.⁸⁹

Finally, the drafter should review the NCAA's "Recommended Policy 6" sections.⁹⁰ Although these are not found in the NCAA Constitution or By-Laws, these recommendations provide some guidance in what should be included in a coaches employment agreement. The NCAA recommendations are as follows:

Section 1. An individual as well as an institution should recognize the moral responsibilities inherent in respecting and fulfilling contractual agreements.

Section 2. An institution should enter into a contractual agreement with a coach similar to those entered into with the other members of the faculty; and such a contract should include the assignment of faculty rank, benefits of tenure and retirement, and such other rights and privileges as are enjoyed by other members of the contracting institution's faculty.

Section 3. When a contracting institution makes special concessions to a coach, they should be set forth in detail in the contract and accepted as legal and binding in the same manner as the other provisions of the contractual agreement.

Section 4. All salary agreements between a coach and an institution should be stated in the contract, and such salary should come from sources under the administrative control of the institution.

Section 5. An educational institution seeking a coach who is under contract to another educational institution is morally obligated first to contact the institution that holds the agreement with the coach and secure permission to negotiate with the individual.

Section 6. A coach should not enter into negotiations with a second institution during the term of the contract without first notifying the institution that is a party to this contractual agreement, and the coach should then

86. *Id.* at 11.5.1.1.

87. *Id.* at 11.5.1.1.1.

88. *Id.*

89. *Id.* at 11.5.1.1.2.

90. J. ORLEANS & E. STONER, *LEGAL ISSUES IN ATHLETICS* 155 (2nd ed. 1989) (quoting NCAA's "Recommended Policy 6").

keep the first institution's administration informed concerning the negotiations.

Section 7. No institution should engage the services of a coach prior to the coach's release from any contractual obligation to another institution.⁹¹

An interpretation of Section 11.3.1 of the NCAA Manual "Control of Employment and Salaries"⁹² has had a recent affect on coaches. The rule has now been interpreted to forbid a head coach from supplementing assistant coaches' salaries. The rule states that, "The institution, as opposed to any outside source, shall remain in control in determining who is to be its employee and the amount of salary the employee is to receive within the restrictions specified by NCAA legislation."⁹³ The head coach for purposes of this rule is considered an outside source.

Galen Hall, who resigned October 8, 1989, as head football coach at the University of Florida, amid allegations of rule violations including paying his assistant coaches extra money, may not have been the only college football coach to pay his assistants.⁹⁴ Hall, admitted at the time of his resignation that he paid \$22,000.00 to two assistants.⁹⁵ Former University of Notre Dame coach Ara Parseghian and University of Oklahoma coach Barry Switzer, admitted that they also supplemented their assistants' salaries. "I will tell you right now, when I was at Notre Dame, I co-shared income that I received," said Parseghian. "But that was after the fact. It was commercial and television money I had received as a reward for our success. I shared it at Christmas, as bonuses, with my assistant coaches."⁹⁶ Switzer said he gave Christmas bonuses to secretaries and graduate assistants when he was head coach at Oklahoma.⁹⁷ He also stated that he gave former assistant Mack Brown, now head coach at North Carolina, a \$30,000 supplement when Brown was hired as the Sooners' offensive coordinator in 1984.⁹⁸ Florida State head football coach, Bobby Bowden, said 90% of coaches do not or did not know that rules existed forbidding the coach from supplementing assistants' salaries.⁹⁹

Don Morton, former University of Wisconsin head football coach, was found by the NCAA to have violated its rules when he took out a loan in

91. *Id.*

92. 1991-1992 NCAA MANUAL DIVISION I BYLAWS, Art. 11.3.1.

93. *Id.*

94. The Sporting News, Oct. 23, 1989, at 56, col. —.

95. *Id.*

96. Chicago Tribune, Oct. 11, 1989, at 2C, col. —; Milw. J., Oct. 11, 1989, at —, col. —.

97. *Id.*

98. The Sporting News, Oct. 23, 1989, at 34, col. —.

99. L.A. Times, Oct. 12, 1989, at 9C, col. 1.

August of 1989 in the amount of \$14,100.00 to pay nine assistant coaches their compensation for salary cuts ordered by the Wisconsin Athletic Board as part of a budget balancing measure.¹⁰⁰ Morton received approval to incur the loan to pay the coaches salaries from former Athletic Director Ade Sponberg, who assumed that "outside sources" referred to non-university sources such as boosters.¹⁰¹

E. The Knight Foundation Commission Report on Intercollegiate Athletics

On March 19, 1991, The Knight Foundation Commission on Intercollegiate Athletics presented its forty-seven page report entitled "Keeping Faith With the Student Athlete: A New Model for Intercollegiate Athletics." The report issued by the twenty-two member Commission after more than eighteen months of study and five hearings does deal with the issue of coaches' athletic-related income. The Commission recommended as follows:

The Commission believes that in considering non-coaching income for its coaches, universities should follow a well-established practice with all faculty members: If the outside income involves the university's functions, facilities or name, contracts for particular services should be negotiated with the university. As part of the effort to bring athletics-related income into the university, we recommend that the NCAA ban shoe and equipment contracts with individual coaches. If a company is eager to have an institution's athletes using its product, it should approach the institution not the coach.¹⁰²

In addition, the Commission addressed the insecurity of the position of coach and long-term contracts. The Commission recommended:

Academic tenure is not appropriate for most coaches, unless they are bona fide members of the faculty. But greater security in an insecure field is clearly reasonable. The Commission suggests that within the first five years of contractual employment, head and assistant coaches who meet the university's expectations, including its academic expectations, should be offered renewable, long-term contracts. These contracts should specifically address the university's obligations in the event of termination, as well as the coach's obliga-

100. *Wisconsin Not Likely to Pay for Mistake*, United Press International, Feb. 15, 1990, at—; U.S.A. Today, Oct. 25, 1989, at 11C, col. —.

101. *Id.*

102. THE KNIGHT FOUNDATION COMMISSION REPORT ON INTERCOLLEGIATE ATHLETICS, Mar. 8, 1991, at 20.

tions in the event he or she breaks the contract by leaving the institution.¹⁰³

The Commission recognized the great import and impact that the coach has in their day-to-day contact with student-athletes:

You and your colleagues are the adults with the greatest day-to-day contact with our student-athletes. You must make them understand that fewer than one in a hundred will ever make a living from their athletic ability. Emphasize to them the value of a college degree. Insist that the privilege of being a member of your squad carries with it the obligation of being a student in good standing. Search out every opportunity to drive home the point that your athletes' behavior, on and off the field, is important not merely because it reflects on your institution or on you, but most significantly because of what it says about them. Your satisfaction will be a lifetime associated with adults who have, with your assistance, achieved their full potential.¹⁰⁴

Rev. Theodore Hesburgh, President-Emeritus of the University of Notre Dame and co-chair of the Knight Foundation Commission on Intercollegiate Athletics indicated that:

"Power coaches, the CEOs of multimillion-dollar athletic enterprises, can become laws unto themselves."

"The surest path to reform lies in reaffirming the integrity of athletics as part of the educational enterprise."

"All funds spent and raised on sports will be under the control of the university. . ."

"Shoe contract income will be negotiated through the university, not with individual coaches."¹⁰⁵

Rev. Theodore Hesburgh concludes that, "But only by restoring the balance between athletics and academics can we keep faith with the student-athlete, with our institutions and with the American public that wants the best for both of them."¹⁰⁶

F. State Open-Records Law

The representative of a coach or university should know the applicable Open-Records law or Freedom of Information statute of the state where the contract is situated. These laws are significant in that the coach may have to allow access by the public to the financial details of his contract. The

103. *Id.* at 21.

104. *Id.* at 27.

105. The Sporting News, Mar. 25, 1991, at 6, col. 2.

106. *Id.* at 6, col. 4.

confidentiality clause inserted in the contract by the lawyer for the university or coach may be rendered ineffective by virtue of such laws. The underlying public policy behind state open-records laws is to "insure accountability of public officers and to enhance public confidence in the political system through disclosure and increased awareness."¹⁰⁷

Three questions must be considered in order to decide whether the public will be able to gain access to the coach's income reports or the coach's contract itself. First, who may use a state's open-records law? Most state laws provide that any person may request a disclosure of documents by an agency; however, a minority of states require that the requester be a citizen of that state.¹⁰⁸

Second, what definition does the state's statute afford the term "public records"? Implicit in any definition of "public records" is that the custodial agency is a governmental agency or body.¹⁰⁹ Normally, state-funded colleges or universities are considered governmental bodies within the meaning of state open-records laws.¹¹⁰ Some private entities may be subject to such laws as a result of receipt of public funds and, as such, would qualify therefor as governmental agencies.¹¹¹

Finally, what exemptions are allowed under the particular state open-records law? The exemption most often found in state open records laws that could pertain to a coaching employment contract would be the invasion of privacy exemption.¹¹² Typically, statutes exempt personnel files, medical files, and similar type files the disclosure of which would constitute an unwarranted invasion of privacy.¹¹³ If, however, the privacy exemption does not specifically include the solicited document or information requested, the courts often will balance the public's need to know against the harm which might result in the invasion of privacy of the person to whom the records relate. While a majority of laws allow the disclosure of elected official's financial information and the financial information of public employees, it is not clear whether states may compel disclosure of a non-elected public employee outside income, even if job related.¹¹⁴

In June of 1988, Peter Gavitt resigned his position as head coach of the University of Maine's women's basketball team. Gavitt's resignation lead

107. Note, *supra* note 26, at 503-05.

108. *Id.* at 505.

109. *Id.* at 506.

110. *Id.* at 507.

111. *Id.*

112. *Id.* at 507-08.

113. *Id.* at 508; *see, e.g.*, 5 U.S.C. § 552 (b)(6) (1979).

114. *Id.*

Gannett Publishing Company to make a series of requests for information under the Maine Freedom of Access Act. The university denied all requests and Gannett filed an action to compel the university to turn over documents and records concerning Gavitt's resignation.¹¹⁵ The university contended that the Maine Freedom of Access Act contained two exceptions to disclosure. There is an exception to disclosure for public employee's personnel records and "[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders"¹¹⁶ There is also an exception for records containing complaints, charges or accusations of misconduct that may result in disciplinary action.¹¹⁷ The university argued that these two exceptions mandated that the settlement agreement between it and Gavitt should remain confidential.¹¹⁸ The court found, however, that there were several sentences in the settlement agreement concerning medical information which should indeed remain confidential, but the remainder of the agreement should be disclosed.¹¹⁹

There is before the Georgia Supreme Court, a suit testing whether Georgia's Open-Records Act requires coaches to make public documentation regarding their outside sources of income.¹²⁰ The Atlantic Journal - Constitution newspaper petitioned the University of Georgia for release of all documents detailing the athletically-related income of University of Georgia, Football Coach and Athletic Director, Vince Dooley, Men's Basketball Coach, Hugh Durham and Women's Basketball Coach, Andy Landers. The newspaper claims access to the memoranda under which the coaches reported their income to University of Georgia's (UGA) President Charles Knapp under the Georgia-Records Act. The coaches in order to block release of documents detailing their income, filed suit against the newspaper. The coaches contended that the documents are not "public records" within the meaning of the Georgia Records Act as interpreted by the case of *Macon Telegraph v. Board of Regents*.¹²¹ In *Macon*, the Georgia Supreme Court held that documents relating to the income and expenses of the University of Georgia Athletic Association are "public records", because the Athletic Association is the management tool by which the Uni-

115. *Gannett Publishing v. University of Maine*, 555 A.2d 470 (Me. Ct. App. 1989).

116. *Id.* at 471.

117. *Id.* at 472.

118. *Id.*

119. *Id.* at 473.

120. Note, *supra* note 26, at 511 (citing *Durham and Landers v. Davidson & Cox Enterprise, Inc.* (Super. Ct. Fulton, Ga.) (filed January 1, 1989) (No. 55-1187)).

121. Note, *supra* note 26, at 511 (citing *Macon Telegraph v. Board of Regents*, 256 Ga. 443, 350 S.E.2d 23 (1986)).

versity operates its intercollegiate athletic program.¹²² However, the court limited its decision by holding that records of the UGA are subject to disclosure only if "the maintenance of documents relating to . . . the intercollegiate sports program is an integral part" of the University President's control of the school's intercollegiate sports program.¹²³ Ironically, the coaches released figures detailing their athletically-related outside income to the newspaper in January of 1988. However, the coaches refused to allow inspection of the documentation with respect to such athletically-related outside income. As a result, the primary issue in the lawsuit is the newspaper's right to inspect and copy certain of the coaches' documents, including federal tax returns, communication with certified public accountants, personal checking accounts, endorsement contracts, letters between the coaches and manufacturers and the forms the coaches used to report verbally to their reporting superior.¹²⁴

II. COACH'S EMPLOYMENT CONTRACT - CONTRACT CLAUSES AND ISSUES

A. Introduction

As previously stated, there is no standard form coach's employment contract, like standard players' contracts in the NBA, NFL, NHL or MLB. A coach's contract can take the form of a simple letter agreement, standard university appointment form or a negotiated contract. This section will discuss contract clauses and issues that are important to the coach's contract from both the university and coach's perspective.

The environment in which some coaches' contracts are negotiated should be understood. Newly appointed head coaches are often so elated to get the "job" that, as long as the package number is respectable, they will execute the proffered contract without the advice of counsel. Universities "often negotiate coaching contracts in a frenzy, making impossible a careful 'invent-the-wheel' legal drafting job within the time constraints."¹²⁵ Further, "the 'general' terms of university coaching contracts often are negotiated by persons who lack knowledge of university's interests and how to protect them."¹²⁶ Consequently, lawyers become the beneficiaries of contracts that have already been negotiated and drafted resulting in a contract

122. *Id.*

123. *Id.* (citing Macon Telegraph, 256 Ga. at 445, 350 S.E.2d at 25).

124. *Id.*

125. Stoner & Nogay, *supra* note 29, at 44.

126. *Id.*

which fails to protect the parties' interests.¹²⁷ Because of the complexity of the issues in today's coach's contract, those skilled in legal training and knowledgeable about the contractual provisions of coaching contracts should be both involved in the negotiation and drafting process.

Edward N. Stoner II, in his speech at the 1987 National Association of College and University Attorneys (NACUA), Section of Athletics', 27th Annual Conference in Albuquerque, New Mexico,¹²⁸ proposed model coaches contract in order to protect the university's interest. In an accompanying article prepared by Edward N. Stoner II and Arlie R. Nogay, details were laid out as to how university and college attorneys should negotiate and draft college coaching contracts.¹²⁹

As the unions in the professional sports have negotiated the contract language for their players, so too should the associations representing college football and basketball coaches. They should take a more active role and interest in not only the format of their coaches contracts, but also the economics of a coaches contract and what the coach and the representative should be negotiating. A central and open source, such as a college coaches contract data bank, should be made available to the attorneys representing coaches so that a format of negotiation agenda and statistical information is available to each representative.

What follows is a discussion of the various clauses and provisions that are normally found in a college coach's contract, along with some specific examples.

B. Duties and Responsibilities of the Coach.

Before a contract can be entered into listing the specific duties of the coach, the coach must agree to devote his best efforts and full-time to the performance of all duties and responsibilities attendant to the position of head coach of that university's particular athletic team. Moreover, the coach must agree to abide by and to comply with the constitution, bylaws and interpretations of the NCAA and all NCAA, Conference and university rules and regulations relating to the conduct and administration of that particular athletic program. Beyond the general responsibilities and best efforts clause, the employment contract will normally list specific responsibilities. For example, a former Midwestern Collegiate Conference (MCC) head basketball coach's contract lists the following specific responsibilities:

127. *Id.*

128. *Id.*

129. Stoner & Nogay, *supra* note 29, at 44.

- A) Assume all of the support services that are necessary for coaching the sport (For instance, recommend competitive schedule, budget, necessary equipment, etc.);
- B) Conduct the program with integrity and in a financially responsible manner which reflects favorably upon the university as a whole;
- C) Maintain a level of performance in the program which is consistent with the goals established by the University;
- D) Provide for and encourage academic counseling for the students-athletes coached by him within the program as their individual circumstances may warrant;
- E) Provide individual and group training and instruction to team members at all practices;
- F) Prepare for and accompany teams to both home and away competitions;
- G) Possess a thorough and up-to-date knowledge of the sport;
- H) Assess talent of prospective students-athletes and recruit high caliber prospects who are capable of performing effectively against the University's scheduled opponents at the highest Division One Level;
- I) Answer all correspondence relative to the sport;
- J) Be available for various community and alumni speaking engagements;
- K) Promote and stimulate interest in the program among students and season ticket holders;
- L) Hire and fire, but only after consultation with the University's Director of Athletics, the Assistant Coaches for the Men's Varsity Basketball Program;
- M) Work effectively with the media;
- N) Perform related duties as assigned.¹³⁰

Specific responsibilities listed in the MCC contract include:

- A) Supervise assistant coaches, including compliance with such coaches with ———Conference and NCAA rules and regulations;
- B) Participate in the instruction and coaching of student-athletes;
- C) Determine scouting schedules for high school and college games;
- D) Interview prospective players, their parents and coaches;
- E) Contact media, alumni and civic groups;
- F) Work to integrate sports into the whole spectrum of academic life to complement the University and its mission in the community;

130. Provisions disclosed under condition name of Coach and University remain confidential.

- G) Work within the confines of rules, regulations, guidelines and policies of the University athletic department;
- H) Keep public statements complimentary to the athletic program and to the University;
- I) Make every effort, working in cooperation with and support of the University's faculty and administrative officials, to ensure that all student-athletes' academic requirements are met;
- J) Have complete knowledge of the rules and regulations governing intercollegiate athletic competition and maintain strict compliance therewith by the program;
- K) Apply effectively experience in recruiting, training and coaching of student-athletes;
- L) Be a disciplinarian but be fair, sympathetic and protective of student-athletes while motivating them to excellence;
- M) Maintain a mature and rational attitude, keep emotions in control and downplay defeats;
- N) Prepare players for each game and each season with dedication; and
- O) Establish and maintain a frequent and systematic program of personal communication with the University's student body.¹³¹

The university will want, in addition to a list of specific duties, a clause indicating that the coach will perform such other duties as are incident and consistent with his position and as may be prescribed from time-to-time by mutual agreement between the parties. From the university's perspective, a listing of specific duties is advantageous especially in attempting to enforce the termination provisions for just cause, i.e., failure to perform the duties and responsibilities specifically assigned.

On the other hand, the coach will probably desire a broad form responsibility statement, such as "performance of such duties as are incidental to the position and as may be prescribed from time-to-time by mutual agreement between the parties" to give the coach an arguable position with respect to the university's charge that the coach has failed to perform the duties of the position.

C. Term of Employment

This clause normally creates a term that is for a stated number of years. Coaching contracts are normally 3 to 5 years in length. Earle Bruce's, former head football coach at Ohio State University, employment contract with respect to term provided: "Subject to the terms of this Agreement, Earle Bruce is appointed by The Ohio State University ("University") to

131. Stoner & Nogay, *supra* note 29, at 59-60.

the position of Head Football Coach ("Head Coach") for a term of three (3) years commencing July 1, 1986, and terminating June 30, 1989."¹³²

With respect to the term of employment, the MCC contract provides:

The Coach's employment hereunder shall commence —, and shall continue until this Agreement terminates on —; provided that this provision is subject to the terms and conditions of Article VI hereof concerning termination and Article VII hereof concerning restrictions on competition and neither party shall have any right to terminate this Agreement prior to — except as provided therein.¹³³

The case of *Roberts v. Wake Forest University*¹³⁴ was an instructive case with respect to the term of the employment contract. The plaintiff, Roberts, was hired pursuant to an oral agreement to become the golf coach and associate athletic director of Wake Forest University. There was an oral agreement on salary, but there was no specific request as to a definite term of employment.¹³⁵ Golf coaches traditionally have a very long tenure.¹³⁶ The plaintiff understood from circumstances surrounding his initial visit to the university that he would be given a reasonable amount of time to demonstrate that he could coach the golf team.¹³⁷

Although the duration of his contract was not fixed, the plaintiff alleged the parties intended employment to be for a substantial period, at least six years.¹³⁸ After less than a year with the program, the President of the University on December 2, 1977 requested plaintiff to relinquish his duties and accept other duties in the athletic program.¹³⁹

The North Carolina court indicated, "[e]mployment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party."¹⁴⁰ In this case, the court indicated that the record falls far short of showing the intention of the parties for a fixed term of employment.¹⁴¹ In addition, the plaintiff relied on the Wake Forest University Personnel Policies and Regulation Manual to support his argument

132. Coach Earl Bruce, Ohio State University, Football Contract.

133. Stoner & Nogay, *supra* note 29, at 59-60.

134. 55 N.C. App. 430, 286 S.E.2d 119 (1982).

135. *Id.* at 433, 286 S.E.2d at 122.

136. *Id.*

137. *Id.*

138. *Id.* at 435, 286 S.E.2d at 123.

139. *Id.*

140. *Id.*

141. *Id.*

that he was a permanent employee and could not be dismissed without cause.¹⁴²

Although the court admitted that the coach was a permanent employee, at least pursuant to the manual, it did, however, indicate that a permanent employee in a general sense means a position of some permanence as contrasted with a temporary employment and ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite hiring terminable at will.¹⁴³ The *Roberts* case is a clear expression of the coaches' need to define in writing the term of his intended employment contract, rather than let custom, usage, or the intentions of the parties bind the pathway of the future term of employment.

Another interesting case with respect to the issue of term of employment is *Lindsey v. University of Arizona*.¹⁴⁴ In the spring of 1982, the University of Arizona attempted to locate a new coach for the Men's Basketball Program. Ben Lindsey, who had successfully coached men's basketball at Grand Canyon College for several years, was ultimately chosen. Lindsey said that at a meeting with the Search Committee, the members therein stated that no one would be hired for the coaching position for less than three to four years.¹⁴⁵ Lindsey also testified that during discussions with the University of Arizona Athletic Director, Dave Strack, Lindsey was told that it was the university's policy to give coaches a minimum of four years before being evaluated.¹⁴⁶ On July 6, 1982, Lindsey accepted a formal appointment as Adjunct Professor of Physical Education from 1982 to 1983.¹⁴⁷ A coaching contract, in the form of a letter to Lindsey from the then University of Arizona President, John P. Schaefer, stated:

Dear Mr. Lindsey:

You are requested to serve as Head Coach of Men's Basketball at the University of Arizona, effective July 1, 1982 and ending no later than June 30, 1983.

It is the policy of the Arizona Board of Regents that an academic-administrative assignment is not a contract and that it can be terminated by the President of the University at any time.

It is also policy that the assignment is renewable at my option and that renewal must be confirmed by a letter from my office. I would appreciate it if you would sign the enclosed copy of the letter

142. *Id.* at 435-36, 286 S.E.2d at 124.

143. *Id.*

144. 157 Ariz. 48, 754 P.2d 1152 (Ariz. Ct. App. 1987).

145. *Id.* at 50, 754 P.2d at 1154.

146. *Id.*

147. *Id.*

to indicate your willingness to serve in this assignment. Please return it to Faculty Records (Administration 507) within ten days.

Sincerely

/s/ John P. Schaefer

JOHN P. SCHAEFFER¹⁴⁸

Lindsey signed the bottom of a copy of the Schaefer letter on July 7, 1982.¹⁴⁹ Above his signature and date he noted, "I hereby accept the foregoing assignment."¹⁵⁰

Lindsey was to receive approximately \$90,000 per year as compensation.¹⁵¹ "This consisted of a \$49,115 annual salary, approximately \$30,000 per year arising from a contract with a shoe company which Lindsey promoted, and an additional \$10,000 anticipated from conducting a basketball camp and other benefits associated with the position."¹⁵²

After Lindsey was hired, the University men's basketball team experienced its worst record in history (4 wins and 24 losses). Sometime around March 15, 1983, the new athletic director, Cedric Dempsey, notified Lindsey that his appointment would not be renewed after June 30, 1983.¹⁵³ The University provided Lindsey two checks totalling \$49,115 as severance pay.¹⁵⁴ Lindsey brought suit, alleging breach of contract, fraud, intentional interference with contractual relations, and intentional infliction of emotional distress.¹⁵⁵

The jury awarded Lindsey \$215,000 for deprivation of three years of employment.¹⁵⁶

The appellate court indicated that:

Despite the specific language contained in the letter from President Schaefer, Lindsey presented evidence from which the jury could have concluded that he would have the security of coaching for four years at the University of Arizona. An employer's oral representation may modify the terms of a contract and create a question of fact for the jury as to the terms of the contract.¹⁵⁷

148. *Id.*

149. *Id.* at 51, 754 P.2d at 1155.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 52, 754 P.2d at 1156.

156. *Id.*

157. *Id.* at 53, 754 P.2d 1157.

The court found that the evidence at trial was sufficient to sustain a verdict that the University breached an express contract with Lindsey by terminating his employment before four years of employment elapsed.¹⁵⁸

Implicit in this finding is the holding that Lindsey accepted a one year renewable contract which the University promised to renew for three additional years.¹⁵⁹ Thus, the appellate court, held that the University violated an oral promise to renew Lindsey's contract for three additional years; therefore, they affirmed the \$215,000 trial court judgment.¹⁶⁰

Obviously, oral promises inducing performance which may be in opposition to the stated letter of appointment were significant in the *Lindsey* case. Discussions, promises, intentions, customs and usages, need to become part of the written document so that there is no mistake with respect to the term and conditions of employment.

D. "Rollover" Provisions

If the university is satisfied with the coach's performance after the completion of each season, the contract may be extended for an additional year so that at all times the remaining term of the contract at the commencement of each succeeding season is the same as the original term of the contract. This is commonly referred to as a rollover clause. To illustrate, Coach Jones has a five year contract with a rollover provision. At the end of each season, the university, with Coach Jones' consent, has a right to extend the contract an additional year, provided the university is pleased with the performance of the coach. Thus, if the university continues to exercise its rollover provision, Coach Jones will have at all times a five year contract. Coach Jones may want the rollover provision to state that if the university does not extend the contract for two consecutive years, the coach has a right to terminate the contract without needing to comply with the release or buy-out provision.

An example of a rollover contract provision suiting Coach Jones' needs is as follows:

The term of this Agreement shall be for a period of five (5) years commencing on April 1, 1989 and ending on March 31, 1994. In addition thereto, the University shall have the right to extend the term of this Agreement with the prior written approval of the Coach for one (1) additional year following the completion of each Men's Varsity Basketball season (but in no event later than May 1st of each

158. *Id.*

159. *Id.*

160. *Id.*

year) during the term of this Agreement. Upon the completion of each season, the Coach will meet with the Athletic Director of the University to review the season. Following such review, a decision shall then be made by the Athletic Director whether or not to exercise this one-year extension option for that year. In the event of a decision to exercise such extension option, then the University shall extend the term of this Agreement for an additional one (1) year in accordance with such decision. If this extension option is not exercised in a given year, however, but is exercised in a subsequent year in the above-described manner, the University may in the event, with the Coach's consent, increase the term of such subsequent extension to a full five (5) year period from the effective date of said extension. In the event the term of the employment is not extended by the University in any two (2) successive years, then the Coach shall have the right to terminate his employment under and pursuant to this Agreement without the necessity of complying with the release provisions as more specifically described in paragraph 9.3 hereinafter.¹⁶¹

Such, a rollover clause has at least four drawbacks to the university.¹⁶² First, a university's notice of a decision not to extend the contract for the extra year could be considered by some to be a current breach of the contract which allegedly and immediately entitles the coach to x - 1 year's of severance pay, or some other remedy.¹⁶³ Second, "[r]ollover clauses are typically poorly drafted because drafters write them in the euphoria of the moment . . ."¹⁶⁴ Third, "[t]he rollover clauses require the university to give years of notice of its intention to let the contract expire."¹⁶⁵ Finally, "[r]ollover clauses are typically one-sided."¹⁶⁶ While they bar the university from removing the coach without paying for the balance of the term, contracts with such clauses tend not to guarantee the university that the coach will not terminate the agreement and coach elsewhere."¹⁶⁷

Some state institutions are prohibited from entering into contracts that bind the institution for more than a period of one (1) year. Often times, even though those contracts are only binding for one (1) year, there will be an expression between the parties of an intent to continue the employment

161. Stoner & Nogay, *supra* note 29, at 47.

162. *Id.* at 48.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

relationship providing the terms of the original contract are met. An example of such a clause is as follows:

The term of this Employment Agreement shall be for one (1) year, commencing —, —, and terminating —. The parties hereby acknowledge that the University is an agency of the State of — and that the law of the State of — prohibit the University from entering into legally binding agreements for periods longer than one year. The parties also agree, however, that absent the occurrence of an event or events that would allow for termination of this Agreement in accordance with the provisions set forth in Article VI hereof or events beyond their control prohibiting such action, it is their intent to enter into successive one-year Agreements on substantially the same terms and conditions as this Agreement for the next — (—) year(s).¹⁶⁸

In *The University of Arizona v. County of Pima*,¹⁶⁹ the University of Arizona attempted to utilize a “fiscal out statute” to nullify contentions of former University of Arizona head basketball coach, Ben Lindsey, that he had an employment contract with the state for longer than one year duration. Arizona Revised Statute Section 35-154 provides as follows:

Unauthorized obligations, effect; liability

A. No person shall incur, order or vote for the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allocation. Any obligation incurred in contravention of this chapter shall not be binding upon the state and shall be null and void and incapable of ratification by any executive authority to give effect thereto against the state.

B. Every person incurring, or ordering or voting for the incurrence of such obligations, and his bondsmen, shall be jointly and severally liable therefor. Every payment made in violation of the provisions of this chapter shall be deemed illegal, and every official authorizing or approving such payment, or taking part therein, and every person receiving such payment, or any part thereof, shall be jointly and severally liable to the state for the full amount so paid, or received.¹⁷⁰

This public statute is referred to as the “fiscal out statute”. The court in this case, however, interpreted the statute as to operate as a condition subsequent, allowing the University of Arizona to avoid its obligations if prerequisite funding is not forthcoming.¹⁷¹ “Subject to this implicit condition,

168. *Id.* at 63.

169. 150 Ariz. 184, 722 P.2d 352 (Ariz. Ct. App. 1986).

170. ARIZ. REV. STAT. ANN. § 35-154 (1986).

171. *The University of Arizona v. County of Pima*, 150 Ariz. 184, 187 722 P.2d 352, 355 (Ariz. Ct. App. 1986).

contracts for more than one year are valid and do not violate the statutory provision against financial obligation for which there is no appropriation."¹⁷² While neither Arizona nor Lindsey had so pleaded, the court indicated that it could take judicial notice of the fact that the University of Arizona had maintained a men's basketball program after Lindsey's termination.¹⁷³ Legislative funding for Lindsey's position must necessarily have been approved.¹⁷⁴ Thus, the court held that the University of Arizona was not prevented from promising a basketball coach a four year period in which to rebuild the basketball program by statutory provision even though the legislature of the State of Arizona could avoid obligations of more than one year if requisite funding was not forthcoming.

E. Reassignment Clause

A reassignment clause allows the university to remove a person as head coach without terminating the employment contract by assigning the coach to a new title and different duties. Often such a clause will contain a statement that the coach is not to be assigned to any job which is not consistent with his education and experience.

An example of a reassignment clause is found in Don Morton's (former University of Wisconsin head football coach) contract. The clause is found under the heading of "Title and Duties During Appointment Term". This clause states that "During the Appointment Term, you shall hold the appointment title and duties of Head Coach in the University's football program, except that at any time during the Appointment Term with 30 days notice, the appointment title and duties as Head Coach may be terminated and another title and duties assigned."¹⁷⁵

If the coach refuses to accept such reassignment, the university may attempt to terminate the contract pursuant to the termination provisions. In essence then, the university wishes to avoid an accusation by the coach that he was constructively discharged by such reassignment. The university will want to shift the burden of refusing to accept reassignment to the coach and such refusal to accept reassignment may be a just cause for the university to terminate the employment contract and, thus, limit the university's liability for liquidated damages. Careful drafting of reassignment clauses must be undertaken to protect the university. Any language as contained in the contract which gives the coach the apparent right to be the "Head

172. *Id.* at 187, 188, 722 P.2d at 355, 356.

173. *Id.* at 188, 722 P.2d at 356.

174. *Id.*

175. Former coach Don Morton, University of Wisconsin, Football Contract.

Coach" during the term of the contract should be avoided. Such language could result in the coach bringing a suit for injunctive relief for the right to continue as head coach for the balance of the term of the contract. The coach could also contend that reassignment is, in legal fact, a constructive discharge, thus, entitling the coach to perform no duties at all and get paid pursuant to the terms of the contract.¹⁷⁶ There is case law in an employment context¹⁷⁷ that would conclude that when a coach contracts to fill a particular position, any material change in duties or significant reduction in rank could constitute a constructive discharge which, if found unjustified, is a breach of the contract. The fact that the coach receives the same salary is immaterial because the status associated with the original position may well have been the primary inducement for making the contract.¹⁷⁸

To ensure maximum protection, the attorney for the head coach will seek a prohibition against reassignment in the employment contract. An example of a clause prohibiting reassignment is as follows:

It is hereby acknowledged by the university that the position in which the coach is hired is unique and requires special talents. The position as herein specified in this agreement is the only position for which the coach is hereby being employed. The university shall have no right pursuant to this agreement to reassign the coach to any other position of employment for the university during the term of this employment or any renewal therefor.¹⁷⁹

Another issue which needs to be defined in any reassignment clause is the compensation that the coach will receive in the newly assigned position, if accepted. For instance, does the coach receive only the guaranteed base salary plus university fringe benefits, or does the coach also receive those other compensation perquisites that are normally associated with the position of head coach?

More recently, the presence of a reassignment clause in a coach's contract has been used by the university as leverage with respect to a buy out of the remaining term of the contract. Essentially, the university will reassign the coach. There will be some confusion or conflict with respect to the salary, fringe benefits and other compensation perquisites available to the coach by virtue of the reassignment. This will eventually lead to a negotiated settlement between the coach and the university with the university using the reassignment clause as leverage in such negotiations. For exam-

176. Stoner, *supra* note 30, at 4.

177. *Id.*

178. *Id.* (quoting Brock v. Mutual Reports, Inc., 397 A.2d 149 (D.C. App. 1979).

179. Clause utilized in undisclosed and confidential coaching contracts drafted by M. Greenberg.

ple, Don Morton, former head football coach of the University of Wisconsin, did not bring football fortunes to the University. Morton was reassigned, pursuant to his contract, from the position of head coach to the position of assistant athletic director in the third year of his five year contract.¹⁸⁰

The issue in the Morton case was not the reassignment clause, but the compensation that Morton would receive for the remaining two years of his contract. The University agreed that Morton had a right to his salary, University fringe benefits, plus a car and country club membership.¹⁸¹ Morton, however, demanded the additional outside income, i.e., his radio and television shows and summer camps that were directly a result of his position of head coach.¹⁸² Although the parties battled their differences in the newspapers, and a lawsuit was Morton's game plan, the parties eventually settled their differences with the University buying out the contract and Morton terminating his employment.¹⁸³

F. Compensation Clauses

Compensation clauses address the monetary aspects of a coaching contract. Unfortunately, parties often believe that what one side gains, the other side loses, causing each side to maintain rigid negotiating postures in order to ensure that their interests are protected. However, benefits can be realized by both sides since the success of one party can often benefit the other. For instance, a clause granting a coach autonomy in running his own television and radio show may produce a more aggressive and quality program since the coach is directly interested. This in turn may produce higher viewership, greater fan interest and ultimately higher ticket sales. Therefore, it is important to focus on the beneficial aspects of compensation clauses of both sides to objectively realize their true impact upon the contract.

1. Guaranteed Base Salary

The first clause normally considered in every coaching contract is the guaranteed base salary (GBS). Simply put, this clause states the amount of money the institution employing the coach's services is willing to pay. An example follows:

180. Milw. J., Nov. 29, 1989, at 1A, col. 1; Milwaukee Sentinel, Dec. 12, 1989, at 1, col. 1.

181. *Id.*

182. *Id.*

183. *Id.* Morton's Ultimate settlement was for \$300,000; see also The Boston Globe, Dec. 22, 1989, at 34C, col. —.

The guaranteed base salary paid by the University to the coach for services and satisfactory performance under the terms and conditions of this Employment Agreement shall be at the rate of \$—— per year, payable in —— installments by the University to the Coach on the —— day of each calendar month during the term of this Agreement.¹⁸⁴

The university may be faced with various limitations as to the extent of such salary in the sense that the coach is no more or less an employee of the university than any other university professor. Therefore, the salary granted a coach is scrutinized and must be justified in light of other coaches' salaries and in the interest of preserving the university's emphasis upon its academic purpose. Even so, many coaches nonetheless retain healthy base salaries despite concerns over the school's academic prestige. Many universities believe a top-rated coach should be compensated as well as a top-rated university professor.

What follows are some sample *estimated* base salaries for head or former head football and basketball coaches from various Division I schools as reported by the news media (the figures as herein expressed have not been verified or corroborated as being true or correct):

SCHOOL	COACH	BASE SALARY
Georgia Tech	Bobby Cremins	\$ 95,000 ¹⁸⁵
Georgia	Hugh Durham	75,000 ¹⁸⁶
Arizona	Lute Olsen	130,000 ¹⁸⁷
Florida	Norm Sloan	99,000 ¹⁸⁸
Kentucky	Rick Pitino	105,000 ¹⁸⁹
Wisconsin	Barry Alvarez	135,000 ¹⁹⁰
Ohio State	Earle Bruce	87,120 ¹⁹¹
UNLV	Jim Strong	100,000 ¹⁹²
Florida	Lon Kruger	110,000 ¹⁹³
NC State	Les Robinson	95,000 ¹⁹⁴

The employment contract should also direct its attention, presuming that the coach's contract is long-term in nature, to periodic increases in the

184. Stoner & Nogay, *supra* note 29, at 63-64.

185. Palm Beach Post, Apr. 30, 1989, at 8C, col. —.

186. *Id.*

187. USA Today, Apr. 13, 1989 at 1C, col. 3.

188. *Id.*

189. Kirkpatrick, *The Blue Grass Isn't So Blue*, SPORTS ILLUSTRATED, Dec. 11, 1989, at 54.

190. Sports Industry News, January 5, 1991, at 9.

191. *The Mystery of Earle Bruce*, L.A. Times, Jan. 17, 1988, Part 3, at 3, col. 2.

192. *UNLV Picks Notre Dame Assistant*, L.A. Times, Dec. 23, 1989, at 2C, col. 1.

193. N.Y. Times, May 2, 1990, at B4, col. 4.

194. Sporting News, May 7, 1990, at 37.

GBS during the contract term. In essence, the coach will be entitled to merit increases based upon periodic evaluations. Normally, merit increases based on periodic evaluations will occur on the same basis as evaluations and increases available to other university coaches within the coach's employment classification. In some instances, the coach, depending upon his leverage, will want to negotiate a guaranteed minimum base increase. The following example illustrates this point:

The coach should be eligible to be paid a merit increase or raise, which raise shall be determined by using the same procedures for evaluating and rewarding meritorious performance as used for other coaches of the coach's classification within the university system. Provided, however, that in no event shall the merit increase during each year during the term of this employment agreement be less than 5% of the previous year's GBS.¹⁹⁵

Some coaches's contracts will contain conditional compensation clauses subject to approval of the university's budget and appropriations. This clause will normally indicate that payment of the compensation as set forth in the contract is subject to approval of annual operating budgets by the university's governing body and appropriations of sufficient funds to pay the coach's compensation. An example of such a clause is as follows:

The payment of all forms of compensation set forth in this agreement is subject to the approval of the annual operating budget by the university's governing body, and the sufficiency of appropriations or the availability of sufficient funds within the athletic department's budget to pay such compensation.¹⁹⁶

2. Fringe Benefits

The employment contract will also contain a provision for fringe benefits. Normally, the coach will be entitled to the standard university fringe benefits appropriate to the coach's university employment classification including but not limited to group life insurance, health insurance, vacation with pay, TIAA/CREF, etc. In addition, there will be a provision covering reimbursement for expenses including all travel and out-of-pocket expenses reasonably incurred for the purposes of and in connection with the performance of the coach's duties. Reimbursement of expenses are normally made pursuant to and in accordance with standard procedures of the university upon presentation of vouchers or other statements itemizing such expenses in reasonable detail. The university, as additional compensation, may pro-

195. See *supra* note 179.

196. Stoner & Nogay, *supra* note 29, at 89.

vide the coach with the use of an automobile during the term of the employment contract. If the university provides a coach with an automobile, there should be a periodic auto replacement provision and a provision for the use of a university provided gasoline credit card. Finally, the university should provide comprehensive liability insurance and be responsible for all costs of maintenance and repair with respect to the subject automobile.

Other forms of fringe benefits may be offered to the coach depending upon his contractual leverage including tuition waivers for his immediate family members, season and complimentary tickets to each of the university's team games including post-season games and tournaments, club memberships to either golf, country club or health club facilities and living accommodations to name a few. For example, Jerry Tarkanian, Head Men's Basketball Coach of the University of Nevada at Las Vegas is alleged to receive as a fringe benefit 234 season basketball tickets (with a face value of over \$40,000) for the coach to dispose of at his will.¹⁹⁷ Joe B. Hall, former Head Men's Basketball Coach of the University of Kentucky was alleged to have received more than 322 complimentary tickets and at one point faced criminal charges for selling those tickets for more than face value, i.e., scalping.¹⁹⁸

Clemson provided former head football coach Danny Ford with a home and made payment on his \$280,000 home mortgage for him.¹⁹⁹ Auburn head football coach, Pat Dye, lives rent-free in a \$500,000 house.²⁰⁰ Both head football and men's basketball coaches at the University of Arkansas have \$10,000 housing allowances.²⁰¹ When Jackie Sherrill signed his Texas A&M contract he was promised as much as \$75,000 toward the purchase of a new home.²⁰² When John Thompson considered leaving Georgetown for a coaching position at the University of Oklahoma, a group of Georgetown alumni purchased a \$300,000 house in the District of Columbia donating the same to the University with the proviso that Thompson be allowed to live in it for as long as he remains at Georgetown.²⁰³ He pays rent, although no one will reveal how much.²⁰⁴

It is extremely important for both the coach and the university to specifically list every fringe benefit provided as part of the employment relation-

197. M. SPERBER, *supra* note 5, at 177.

198. *Id.* at 178.

199. *Id.* at 196.

200. *Id.*

201. *Id.*

202. *Id.* at 196, 197.

203. Gellitt, *The Gospel According to John*, SPORTS ILLUSTRATED, Dec., 1980 at 90, 102.

204. *Id.*

ship to avoid any future assertion by the coach of any assumed fringe benefit not listed in the contractual arrangement.

3. Moving - Relocation Expense Allowance

The coach is bound to incur expenses in his move from his old employment to his new coaching position. The coaches' representative may want to negotiate for a moving - relocation expense allowance. The allowance should cover some, if not all, of the following moving related expenses: house hunting expenses, travel expenses, expenses for moving household goods and personal affects, including packing, storage and insurance, temporary lodging, extraordinary costs incurred to dispose of former residence, such as a mortgage prepayment penalty, costs incurred in the buy out of an existing leasehold obligation, and costs such as attorney fees, commissions or other expenses incurred in the purchase of the new residence, etc. The contractual clause should either cap out the total amount of dollars that the university is willing to expend on such allowance or specifically list without limit those expenses for which the moving-relocation expense allowance applies.

4. Bonuses

Bonus clauses in employment contracts are in the nature of supplemental compensation as an incentive based upon a coach's performance. These incentives may come in the form of a predetermined set amount or in the form of percentages of either the coach's base salary or of the net revenues received by the university as a result of post-season play. What follows is a listing of some bonus types:

1. Signing bonus. (Execution of original employment contract or renewal contract)
2. Participation in post-season tournaments or Bowl games
3. Regular season win/loss record
4. Regular season or conference championship
5. End of year conference championship tournament
6. Home game attendance
7. Graduation rates or grade attainment levels
8. Length of service based on years of employment (annuity)

Lon Kruger, head basketball coach at the University of Florida, will earn a \$1,000.00 bonus if 40% of his scholarship players graduate and \$2,000.00 bonus if 50% of his scholarship players graduate.²⁰⁵ He will gain

205. Sports Industry News, June 1, 1990, at 165.

an extra month's salary in any year that 60% of his scholarship players earn their degree.²⁰⁶

Bill Frieder, head basketball coach of Arizona State University can earn up to \$14,000.00 for winning the NCAA Tournament, \$10,000.00 for improving the academic performance of his players and \$30,000.00 if season home attendance exceeds 11,000.²⁰⁷

Lute Olsen, head basketball coach of the University of Arizona, has performance bonus clauses in his contract which could earn him an additional \$33,000.00 per year.²⁰⁸ These clauses are triggered if the team goes to the Final Four and if players achieve a specified academic performance.²⁰⁹

Jerry Tarkanian, by virtue of taking his team into the 1990 Final Four, earned 10% of the team's net revenue for its appearance.²¹⁰ Since each team in the Final Four earned approximately \$1,432,500.00, Tarkanian can expect to receive \$143,250.00 in addition to his regular salary.²¹¹

The popular coach will be in demand for personal appearances and speaking engagements by local and national alumni and booster groups. The coach and university will normally negotiate a specific number of appearances to be made by the coach as part of his salary compensation package. Appearances over and above the base minimum should result in the coach being compensated in the form of additional compensation or bonus. A sample clause is as follows:

As part of the compensation as hereinstated, coach shall be required to participate in at least — alumni-booster personal appearances or speaking engagements. The university shall be responsible for incurring all expenses with respect to the making of such speeches or appearances. In the event that in any contract year the coach is required to make in excess of the minimum amount of personal appearances or speaking engagements as required herein, coach shall receive as additional compensation, \$—— per speaking engagement or public appearance. This paragraph shall not in any way prohibit the coach from separately entering into agreements or making public appearances on his own behalf and not for the university wherein the coach is compensated from a third party other than the univer-

206. *Id.*

207. Sports Industry News, Mar. 24, 1989, at Data Page.

208. U.S.A. Today, Apr. 13, 1989, at C1, col. 3.

209. *Id.*

210. N.Y. Times, Apr. 1, 1990 at 6, col. 2.

211. *Id.* With an annual base salary of \$203,976, Tarkanian is Nevada's highest paid State employee, Milw. J., June 5, 1991 at C5, col. —.

sity, all as provided by the outside employment provisions of this contract.²¹²

5. Additional Retirement Benefits

Retirement benefits separate from the university's fringe benefits in the form of an annuity seems to be popular today in college coaching. Such benefits are used as additional incentives for the coach, not only in recognition of his accomplishments, but in hope of retaining the coach for the full term of his contract. There are two methods for providing additional retirement benefits.²¹³ Under the first method, the university can purchase an annuity which the coach owns. As the university pays premiums, the coach includes those premiums in income.²¹⁴ The advantage for the coach is that, the earnings are tax deferred until they are withdrawn.²¹⁵ The advantage of annuities are that if the interest or earnings are allowed to compound on a tax deferred basis, there can be a substantial increase in the net worth of the annuity in a very short period of time.²¹⁶ Annuities are normally purchased through insurance companies and take on such form as straight or life annuity, joint and survivorship annuity, refund annuity, deferred annuity and variable annuity to name a few. It is suggested that the coach seek assistance of not only a financial advisor, but a life insurance agent when attempting to structure an annuity that most perfectly fits his economic and retirement situation.

Under the second method, the university agrees to pay a retirement benefit as deferred compensation.²¹⁷ The university can use a commercial annuity to accumulate funds to pay the deferred compensation benefits, but the annuity must be owned by the university and the retirement benefits are paid by the university.²¹⁸ There are special income tax considerations that must be kept in mind when negotiating deferred compensation for university coaches.²¹⁹ Section 457 of the Internal Revenue Code imposes limitations on the amount that an employee of a tax-exempt organization can defer under a nonqualified deferred compensation plan.²²⁰ As a general rule, an employee of a tax-exempt organization, such as a university, will be

212. *See supra* note 179.

213. Interview with John K. O'Meara, Assistant Director Advanced Marketing, Northwestern Mutual, May 20, 1991.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

taxed on any amount he defers if the "amount of compensation deferred" exceeds \$7500.²²¹ While the rule is defined in terms of the amount that the employee actually defers, the Internal Revenue Service has taken the position that the limitations of section 457 also apply to nonqualified retirement plans that do not involve elective deferrals by the employee.²²² Consequently, additional retirement benefits provided as an incentive would be includible in the coach's income currently if the section 457 limit is exceeded.²²³ Presumably, in cases where the coach does not actually defer current compensation but rather the university agrees to pay an additional retirement benefit, the "amount of compensation deferred" would be determined by calculating the present value today of the benefit that is promised in the future.²²⁴ In those situations where the university agrees to set aside a specified amount for the benefit of the coach, the amount set aside would be the "amount of compensation deferred".²²⁵ The limits imposed by section 457 can be exceeded without targeting current taxation on the deferred amount if there is a substantial risk of forfeiture on the right to receive the benefits.²²⁶ Section 457 defines substantial risk of forfeiture as a condition requiring the future performance of substantial services by an individual.²²⁷ In a case where the university wants to provide a substantial nonqualified retirement benefit, taxation of the promised benefit can be postponed until retirement if the right of the coach to receive the benefit is conditioned on his continuing to perform services for the university until the time when benefits are due.²²⁸ Since it is not likely that the coach will provide substantial services after retirement, the risk of forfeiture will lapse and the coach will be taxed on the present value of the future benefits or the value of the account set aside for his benefit at the time he retires.²²⁹ Because of the acceleration of the income tax, it is necessary to structure the payments so that there is a balloon payment at retirement so that the coach can pay the tax and still receive the retirement income desired.²³⁰ As subsequent payments are made, a portion of the payment will be tax-free to the coach as representing the amount on which he already paid tax.²³¹

221. *Id.*

222. *Id.* (citing Internal Revenue Notice 87.13, 1987-1 C.B. 432, QSA 26 (1991)).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* (citing I.R.C. § 457(f) (1991)).

227. *Id.* (citing I.R.C. § 457(f)(3)(b) (1991)).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* (citing I.R.C. § 457(f)(1)(B) (1991)).

Pat Dye's, head football coach of Auburn University, financial package will be augmented by a retirement plan including an annuity with \$1 million at age 65.²³² Nolan Richardson, whose Arkansas basketball team made the 1990 Final Four, has obtained a \$1 million annuity to make certain of his stay at Arkansas.²³³ Xavier University is alleged to have given basketball coach Pete Gillen an annuity or insurance policy worth \$1 million after he rejected overtures to fill the coaching vacancy at Virginia.²³⁴ Denny Crum, the Head Men's Basketball Coach at the University of Louisville will obtain a lump sum payment of \$1 million in 1993, if he fulfills the obligations of his long-term contract with the school.²³⁵ An example of an annuity or endowment fund clause is as follows:

In recognition of the contribution by coach to the university's athletic program in general and to the basketball program in particular, the university shall establish a special endowment fund and on August 31st of each year during the term of this Agreement, the university shall deposit the sum of \$100,000 to the fund from gifts and/or grants received for athletic purposes. The payments, as to principal made to this fund as well interest as all capital appreciation realized within the fund shall be fully vested in coach.

The total value of the fund shall be determined as of August 31, 1995 and subsequently paid to coach within 120 days thereafter pursuant to a withdrawal program mutually agreeable to the coach and the university. In the event of coach's death prior to August 31, 1995, the university shall be obligated to continue to make such principal payments to said fund and the total value of such fund as of August 31, 1995 shall then be paid within 120 days thereof to coach's surviving spouse or designee pursuant to withdrawal program mutually agreeable to said surviving spouse or designee pursuant to a withdrawal program mutually agreeable to said surviving spouse or designee and the university.²³⁶

232. M. SPERBER, *supra* note 5, at 194.

233. The Washington Post, Apr. 3, 1990, at B5, col. 2.

234. The Sporting News, Apr. 16, 1990, at 29.

235. M. SPERBER, *supra* note 5, at 194. Sperber stated that an

Increasing number of schools are using future bonuses and annuities as an attempt to insure that a coach will not jump contract for another job. In Crum's case, the promised \$1 million appears to have kept him from accepting various attractive coaching offers, including one from UCLA, his alma mater. This use of future annuities as a defensive strategy against the Coach in Motion Play also contradicts the standard coaches' complaint that schools are ready to fire them after the first losing season.

236. See *supra* note 179.

G. Provisions Concerning Outside or Supplemental Income Sources

Contrary to popular belief, a successful coach's life-style is not conducive to long vacations, lazy afternoons during the off-season and three hours of fun and excitement on game day during the season. The majority of the successful coaches are either on the road recruiting or in the film room strategizing and/or performing the multitude of duties of what could be a 24-hour a day job. Equally misconceived is the notion that all college coaches earn top salaries. Again, the majority earn only modest incomes.

For this reason, there exist clauses within the framework of the contract which provide coaches with the opportunity to supplement their income through outside sources. Outside income significantly affects the economics of high visibility college sports. Coaches of successful football and basketball programs often make more money from outside income than they do from their base salaries which may be restricted either by law or budgetary limitations.

Generally, the university will require that certain requisite conditions be followed by the coach prior to engaging in any outside business or entrepreneurial endeavor. First, and foremost, the university will require that its interest and the obligations owed to it by the coach remain primary. This is based on the fiduciary relationship between the university and the coach and the duty of loyalty owed by each to the other. This covenant is an attempt to avoid inferior performance in the coach's duties resulting from conflicts of interest and compromises.

Secondly, the coach is subject to all NCAA rules regulating the coach's sources of income. In this way, the coach's independent judgment cannot be persuaded by outside interest groups.

Thirdly, the university will normally retain the right of final approval before the coach is allowed to enter into such agreements. However, the university's right of approval may not be used to unreasonably deny the coach's justifiable request or income expectancies.

The coach may or may not retain all of the proceeds which result from outside sources. Whether the income is the university's or the coach's should be specifically designated in the contract. Presumably, if the coach acts independent of the university, he will retain the proceeds from such outside sources. If, on the other hand, the university supplies the means or personnel to assist the coach, it may require a certain percentage of the proceeds or a predetermined fee.

The university will also want a statement that such outside employment is independent of the university's employment and the university will have

no responsibility or liability for any claims arising from the performance therefrom. An example of an outside employment clause is as follows:

Coach shall devote such time, attention and efforts as necessary to fulfill the duties under and pursuant to this Agreement and shall not become associated directly or indirectly in any "other business or employment" without first obtaining the prior written consent of the University, which consent shall not be unreasonably withheld. For purposes of this provision, Coach's participation in speaking engagements and personal appearances, coaches clinics, basketball camps, radio and T.V. appearances other than those to be compensated pursuant to this Agreement, and athletic shoe, apparel and equipment endorsement contracts shall not be deemed, for purposes of this Agreement, to be "other business or employment" requiring the consent of the University. Coach shall schedule such activities so as not to interfere with his responsibilities hereunder. It is hereby further understood and acknowledged by the University that any compensation received by Coach with respect to permitted "other business or employment" shall be the sole compensation of the Coach hereunder.²³⁷

1. Radio and Television

Common to any sporting organization is the media attention it attracts. Radio and television talk show programs featuring the coach offering direct contact between the coach and the fans are a lucrative source of income for coaches.

There are various alternatives as to how these radio and television show contracts are structured and negotiated. First, the coach may negotiate independent of the university with a radio or television station. The coach would receive the compensation from such show with the university not being responsible for any amounts due and owing under such agreement. A second alternative is where the university has an agreement with a particular radio or television broadcaster for the production of a show in conjunction with its athletic program. The coach is paid directly by the media representative. The coach in these instances should require a minimum dollar guarantee with respect to such shows each year.

Another alternative is where the university itself owns all rights to the program and controls the production and marketing. The coach may be required under, such university controlled and produced shows to assist in procuring sponsors and to make commercial endorsements on behalf of program sponsors. The coach will normally participate in the financial suc-

237. *Id.*

cess of such university program on a negotiated basis. If the university controls production and marketing of its television and radio programming, it may require the coach not to appear in any competing radio or television program during the season except routine news media interviews.

While the structuring of radio and television deals make take different formats, some coaches are alleged to enjoy enormous profits from their enterprises. When Bill Dooley was football coach at Virginia Tech, he was paid a talent fee by the school for appearing on television and radio shows for an estimated \$85,000.²³⁸ When Jackie Sherrill was at Texas A&M it was alleged that he received at least \$135,000 a year from the sponsors of his television and radio shows.²³⁹ In Sherrill's case and in similar deals, many of the sponsors are athletic department boosters who see the payments as a way of helping their favorite athletic programs. However, sponsors-boosters can write-off the money spent as a deductible business expense (part of their company's advertising).²⁴⁰

2. Endorsements

As a result of their high public profile and stature, coaches may often times attract product or organizational endorsement offers, especially if the coach is enjoying enormous popularity among boosters and the public. Basically, three important ingredients can combine to create a marketable coach: (1) Television or media exposure; (2) a creative personality; and, (3) a big win.²⁴¹ Typically, the university will require that the coach not utilize his university association with any product endorsement. However, the coach will require that he be permitted to identify himself as the coach of the particular athletic team.

Former North Carolina State head basketball coach, Jim Valvano, is a prime example of how endorsements can be utilized to create a lucrative supplemental income. After his team won the NCAA national basketball championship in 1983, Valvano was hailed as one of the top-rated coaches and strategists in the game. His reputation as a colorful speaker and unique personality soared, and his comfort in front of a camera all combined to make him an endorsement gold mine. As a result, Valvano came out with his own line of clothes called Coach "V's", authored an Italian cookbook

238. *Id.* at 186.

239. *Id.* at 187.

240. *Id.*

241. Comte, *Coaches for Sale*, Sports Inc., Apr. 18, 1988, at 40. Comte states: "Athletes aren't the only sports figures who can make big endorsement dollars. Madison Avenue has its eye on college coaches, especially those with personality, TV exposure and most importantly, a big win."

and served as spokesman for Ronzoni Pasta.²⁴² This was in addition to the numerous other product endorsements, (car companies, Washington Speakers Bureau, corporate art, etc.) which allegedly earned him as much as \$750,000.00 a year.²⁴³

3. Shoe, Apparel and Equipment Contracts

Shoe contracts are generally negotiated between the coach and the shoe company. In most cases, the company will pay the coach a certain sum of money as a consultant and provide a supply of shoes, warm-up togs and gym bags in exchange for the coach's team players wearing the shoes. The benefits are readily apparent to the shoe company in that high profile teams advertise their product during every game. At almost every major collegiate program, a shoe company contracts to have its shoes worn by the coach and team members. When considering the hundreds of thousands of dollars television broadcasters are demanding for 30 second commercial slots, \$100,000 for 25 games at 40 minutes a game is a bargain. In a typical shoe contract provision, the coach will want the university's agreement that the coach may require the athletic team to wear the shoes during competition. In addition, the coach will also want the university to consent that he may be permitted to wear, promote, endorse or consult with the shoe, apparel or equipment manufacturer concerning the design or marketing of

242. B. Jacobs, *Endorsements: Coaching For Dollars*, Sports Inc., Feb. 8, 1988, at 42.

243. *Id.*, "One Man's Enterprise": North Carolina State head coach, Jim Valvano's outside income:

- Four-year shoe endorsement contract with Nike at more than \$100,000 a year.
- Three-year contract to serve as spokesman for a Durham, N.C., Nissan Dealership.
- Contract with the Washington Speakers Bureau for a guaranteed 25 appearances at \$8,500 per appearance (\$212,500).
- Endorsement contract with a national insurance company (pending).
- Host of Jim Valvano's Road to the Final Four, airing on New York's MSG Network and SportsChannel.
- Pilot episode of another national sports show.
- Host of the Jim Valvano Show, which airs on six network affiliates in North Carolina, ESPN, Home Team Sports, Dimension Cable in Arizona and Sportsvision in Chicago.
- Jim Valvano Basketball Camps on the North Carolina State campus.
- Four-year contract with Capitol Broadcasting in Raleigh, N.C., for personal services and appearances on radio and television shows.
- Half-owner of Center-Vitale, a subsidiary of JTV enterprises, which creates corporate art. Among the life-size statues already commissioned are one of Aristides, the first winner of the Kentucky Derby, for Churchill Downs; one of Julius Erving for the Spectrum in Philadelphia; and one of Walter Payton that will be given to the city of Philadelphia; and one of Walter Payton that will be given to the city of Chicago. Miniatures of the originals are made and sold for up to \$2,000 each. Source: JTV Enterprises.

Id.

such shoe, apparel or equipment without such activities being in violation of the employment agreement.

Mark Thomasshaw, corporate counsel for the Nike Shoe Company, states that the four or five top college basketball coaches in the country can earn as much as \$200,000 apiece to sign endorsement contracts with shoe companies. Others in the top ten can expect between \$100,000 and \$200,000.²⁴⁴ The Nike Shoe Company has about 60 major college coaches under contract.²⁴⁵ Converse has 41 coaches under contract and Reebok's roster includes 26 coaches.²⁴⁶ For example, it has been reported that John Thompson (Georgetown) received \$200,000.00 annually, Eddie Sutton (formerly of the University of Kentucky) received \$160,000.00 annually, Jim Valvano (formerly of North Carolina State) received \$160,000.00 annually, Jerry Tarkanian (University of Nevada Las Vegas) received \$120,000.00 annually, and Jim Boeheim (Syracuse University) received \$120,000.00 annually.²⁴⁷ It has also been reported that Bobby Cremins, head basketball coach of Georgia Tech, first shoe contract with Converse paid him \$5,000.00 in 1981.²⁴⁸ After winning the 1984-85 Atlantic Coast Championship, Converse signed Cremins to a four year contract at \$70,000.00 per year.²⁴⁹ In 1989, he signed a multi-year contract with Nike for \$160,000 per year.²⁵⁰

Below the six figure echelon, at least 75 NCAA Division I Men's Basketball head coaches have contracts in the \$40,000 or higher range and the leading women's head coaches average \$10,000 a year.²⁵¹

Sporting News in its February 4, 1991 issue reported the top shoe deals for college basketball head coaches for the 1991 season from information obtained from the Newport News Daily Press:

244. D. HOFMANN & M. GREENBERG, *SPORTS BIZ* 101, 102 (1989).

245. *Id.* at 102.

246. Kirkpatrick, *The Old Soft Shoe*, *SPORTS ILLUSTRATED*, Nov. 16, 1988, at 98.

247. M. SPERBER, *supra* note 5, at 184.

248. Kirkpatrick, *supra* note 246, at 98.

249. *Socking Away 160,000 in Shoe Deal*, *Sporting News*, Feb. 1, 1988.

250. *Id.*

251. M. SPERBER, *supra* note 5, at 184.

SHOE COMPANIES

TOP SHOE DEALS FOR COLLEGE AND BASKETBALL COACHES:

No.	Coach	Team	Company	Per Year
1	Dale Brown	LSU	L.A. Gear	\$300,000
2	Mike Krzyzewski	Duke	Adidas	\$260,000
3	Bob Knight	Indiana	Adidas	\$200,000
4	John Thompson	Georgetown	Nike	\$200,000
5	Dean Smith	N.Carolina	Converse	\$200,000
6	Jim Boeheim	Syracuse	Nike	\$150,000
7	Lute Olson	Arizona	Nike	\$150,000
8	Jerry Tarkanian	UNLV	Nike	\$150,000 ²⁵²

Not all universities permit the coach to contract directly with the shoe company. For instance, University of Virginia coaches instead of having contracts directly with shoe companies have the athletic department handle the Cavaliers endorsement contracts by seeking bids.²⁵³ The Virginia's Attorney General's office issued an opinion that any coach at a state university who accepted promotional money from athletic shoe companies was violating the state conflict of interest laws.²⁵⁴

One of the legacies of Lefty Driesel's departure from Maryland after the death of Len Bias was a rule that Terrapin coaches could no longer negotiate private endorsement contracts.²⁵⁵ The new Maryland policy requires the university to negotiate all endorsement contracts and the coach shares in the revenues on a negotiated basis.²⁵⁶

4. Income from Speeches and Written Material

The contract should permit the coach to deliver speeches, make public appearances, grant media interviews, write and release books and magazine articles and receive the compensation therefor. The coach will also want permission to utilize publicly his reference to the university as coach. The

252. The Sporting News, February 4, 1991, at 42, col. —. "In 1985, Americans paid \$1.4 billion for athletic footwear. This year we will spend an estimated \$5.5 billion. Long range predictions put sales over \$20 billion by the end of the century." Milw. J., June 24, 1990, at C3, col 1; "In 1990, Nike became the largest sports and fitness footwear and apparel company in the world. Profit for Nike's entire 1990 fiscal year rose 45% to \$242.96 million or \$6.24 a share from \$166.05 million or \$4.45 a share in 1989. Annual revenue rose 31% to \$2.24 billion from 1989's \$1.71 billion. In the United States alone, Nike estimates that it holds about 28% of the market. Its closest competitors, Reebok International Inc., and L.A. Gear Inc., hold 22% and 12% of the US market respectively." Milwaukee Sentinel, July 10, 1990 Part 2, at 2 col. 4.

253. The Sporting News, Nov. 24, 1986, at 38, col. 1.

254. *Id.*

255. *Id.*

256. *Id.*

university, however, will want some type of limiting clause that the coach represents the university in a professional manner and does not bring any discredit or disrespect upon the university in such spoken and written materials.

Success breeds success on the rubber chicken circuit. Southern Cal head coach Larry Smith, who makes only \$97,000 in base salary is guaranteed \$150,000 annually from the USC Speakers Bureau.²⁵⁷ He earns \$6,000 for each speaking engagement.²⁵⁸ Terry Donahue of UCLA also earns \$6,000 for every speaking engagement while former Pitt head coach, Mike Gottfried, earned \$5,000.00.²⁵⁹ Lou Holtz of Notre Dame, however, is the king of college football coaches when it comes to speaking engagements. He commands \$18,000 per speech and accepts as many as 30 speaking dates during the off-season.²⁶⁰ Companies interested in retaining Holtz must book him six months in advance.²⁶¹

5. Summer Camps

Another source of income for the coach is summer athletic camps and clinics. The first issue to be considered is whether the university or the coach is the sponsor of such camps. Normally, the coach will want the opportunity to use the university's facilities in connection with such summer camp without cost or at a minimum cost. Another vital question will be which party is to provide and pay for the camp's liability insurance. An example of a summer camp provision is as follows:

As additional consideration for the services to be rendered by the Coach hereunder, the University shall make available to Coach for summer basketball camps the use of the University gyms and facilities at a rate not to exceed \$3.00 per camper per week and will charge Coach lodging and food costs for the campers at normal University rates. The \$3.00 per camper per week shall include the use of the University's gym and related facilities, including locker room, swimming pool and the like and shall further include any and all insurance required for the purposes of operating such summer basketball camps.²⁶²

Murray Sperber in his book, *College Sports, Inc.*, provides the following commentary on the profits many coaches earn from their summer camps:

257. The Sporting News, Oct. 23, 1989, at 56, col. 2.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at col. 3, 4.

262. See *supra* note 179.

Unlike intercollegiate athletics, with its tremendous start-up costs and huge ongoing expenses, camps can be established and run on a small amount of capital. Because costs tend to be low — thanks to the university — summer camp profits for many coaches are outstanding, in many cases double their annual salaries.

Coaches run their camps in one-week sessions, for as many as ten weeks during a summer; campers who board pay an average of \$200 to \$300 a week; day campers, \$150 to \$250. Bill Frieder, when at Michigan, is reported to have grossed over \$350,000 for his 1986 basketball summer camps. Charles "Lefty" Driesell, the former coach at Maryland, resigned from his coaching job after his star player, Len Bias, died from a cocaine-induced seizure; Driesell, however, insisted on keeping his camps at the university and, in 1986, had 875 kids pay \$264 each for a \$231,00 gross. Moreover, in his settlement agreement with Maryland, the school continued its \$20,000 subsidy to defray Driesell's dorm and facility bill. Even when Driesell moved to James Madison University, he got to keep his Maryland camps and subsidies.²⁶³

H. Disclosure of Outside Income

Article 3, Section 2g of the NCAA Constitution requires annual disclosure by the coach to the president of the university through the athletic director of all athletically-related income and benefits earned or received from outside sources.²⁶⁴ The purpose of this requirement is to monitor the sources of a coach's outside income and to increase and maintain university control over intercollegiate athletic programs. The rule also was intended to have university presidents informed of possible conflicts of interest and commercial influences on coaches. Hofmann and Greenberg in *Sport\$ Biz* provide an interesting interpretation of the disclosure issue:

There was a move in 1988 to get some kind of handle on coaches' outside income. A proposal was drafted that would require institution approval before a coach could take the money directly. To no one's great surprise, 77% of the university presidents surveyed were all for the idea, and 94% of the basketball coaches were against it. The coaches fought off outright limits on outside income with a compromise measure requiring them to report what they made to school administrators. But they weren't really crazy about that either, because they figured the administrators would disclose what

263. M. SPERBER, *supra* note 5, at 180.

264. 1991-1992 NCAA DIVISION I BYLAWS, Art. 11.2.2.

the coaches told them, thereby creating pressure for income limits.²⁶⁵

Former University of Kansas head basketball coach, Larry Brown, was not pleased with NCAA efforts involving controlling sources of outside income. Brown stated, "[d]o universities oversee the money professors make from royalties and from being on corporate boards. . . I'll accept them limiting what I earn if they will grant me tenure."²⁶⁶

Some coaches are not only against limits on their outside income, but are also reluctant to release income information to the public. For instance, the Charleston Gazette completed a story about West Virginia head football coach, Don Nehlen's and head basketball coach, Gale Catlett's income sources only after the newspaper filed a Freedom of Information request.²⁶⁷ This request revealed that outside income, including an endowment, shoe contract and sports camps more than tripled the base salary of Nehlen and Catlett.²⁶⁸ The Gazette reported that Nehlen earned \$224,909 to coach football and Catlett earned \$198,484 a year.²⁶⁹ Nehlen's base salary from the State of West Virginia was \$71,208.²⁷⁰ This amount was increased by \$3,800 from his football camp, \$49,000 from the athletic department endowment fund and \$25,000 from the Mountaineer Athletic Club (MAC), the newspaper reported.²⁷¹

The football coach also earned \$40,000 from the Mountaineer Sports Network and \$11,900 from West Virginia Radio for his radio and television shows; \$12,000 for advertising Chrysler automobiles; \$10,000 from a shoe contract and \$2,000 for personal appearances, the Gazette added.²⁷² Catlett, who earned a state base pay of \$60,684, earned an additional \$21,000 from his summer basketball camps and \$36,000 from the endowment fund.²⁷³ He also earned \$31,000 from a shoe contract; \$30,000 from the Mountaineer Sports Network and \$19,600 from West Virginia Radio, the newspaper reported.²⁷⁴

265. D. HOFMANN & M. GREENBERG, *supra* note 244, at 101-02.

266. Lederman, Will Proposal to Oversee Coaches' Pay Trip the Great Sneakers Sweepstakes, *Chronicle of Higher Education*, October 29, 1986, at 38, col. 1.

267. Catlett, *Nehlen Earns \$200,000 Annually*, *United Press International*, May 5, 1989.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

Both Catlett and Nehlen had received large income increases during the last several years. During the 1984-85 fiscal year, Nehlen earned \$154,824 while Catlett earned \$143,842.²⁷⁵

By contrast, the average West Virginia University professor earns \$35,500.²⁷⁶

I. Guaranteed Contracts

College coaches, should attempt to negotiate a "guaranteed contract" with the university. This may be a quid pro quo for a long-term contract. The university agrees to guarantee a portion or all of the coach's salary regardless if the coach should die or become disabled during the term of the contract. An example of a "guaranteed contract" provision is as follows:

Notwithstanding anything to the contrary, the compensation as stated in Paragraph 4 shall be deemed to be a Guaranteed Base Salary. "Guaranteed Base Salary" as used herein shall mean that Coach shall be paid said Base Salary as hereinbefore stated through the term of this Agreement regardless of and in the event that the Coach shall die or become partially and/or totally disabled so that the services as hereinbefore referenced cannot be performed pursuant to the terms hereof. The intention as hereinstated is that the Base Salary as from time-to-time increased and determined during each year of the term of this Agreement shall be deemed to be guaranteed and paid as a contractual obligation of the University for the entire term of this Agreement as extended. It shall be the University's sole financial responsibility to fund the guarantee as herein contemplated either with its own financial resources and/or the purchase of such insurance policies as to guarantee the payment as herein required.²⁷⁷

J. Termination Clauses

The volatility of the coaching profession and the number of firings, removals and job movements make termination clauses one of the most significant provisions in the coaching contract. Often times, a coach's career is launched upon a contract which has been poorly drafted since it is not prepared to handle the many situations which may arise during the course of the contract term including premature termination. The end result is that one side is forced to abandon ship and often amid rocky waters.

275. *Id.*

276. *Id.*

277. *See supra* note 179.

A. Death - Disability

The university will want the employment contract to automatically terminate if the coach dies or becomes totally disabled with the coach's salary and all other benefits terminating as of the calendar month in which death occurs, except that the coach's personal representative shall be entitled to such other death benefits, if any, and such disability/salary continuation benefits to which he is entitled under the university's disability program.

The coach's representative will attempt to negotiate a guarantee provision in the contract at least with respect to the base salary so that in the event the coach should die or become partially or totally disabled, the base salary would be guaranteed and paid by the university for the entire term of the contract either through the university's funds or through the purchase of such insurance policies as are necessary to guarantee the required payments.

1. Termination by the University for Just Cause

Termination clauses whether or not they require "just cause," are generally the most difficult to negotiate in the employment contract. Termination controversies between coaches and universities have drawn and will continue to draw great attention from the media. A coach's contract will almost always contain "termination for just cause" provisions empowering the university to terminate the contract at any time at its sole discretion if there is a determination by the university that the coach has committed a violation, intentionally or not, of any law, rule, regulation, constitutional provisions or by-law of the university, United States, the state of jurisdiction, the participating conference or the NCAA and such violation reflects adversely upon or may impugn the image of the coach, university or its athletic program, including any deliberate or serious violation which may result in the university being placed on probation. The NCAA requires that contractual agreements between a coach and a university include a stipulation that the coach may be suspended for a period of time, without pay, or that the coach's employment may be terminated if the coach is found to be involved in deliberate and serious violations of NCAA regulations.²⁷⁸

The Knight Commission reports that approximately one-half of all Division I-A institutions (the 106 colleges and universities with the most competitive and expensive football programs) were the object of sanctions of varying severity from the NCAA during the 1980s.²⁷⁹ Rules, rules, rules, it

278. 1991-92 NCAA DIVISION I BYLAWS, Art. 11.2.1.1.

279. THE KNIGHT FOUNDATION COMMISSION REPORT ON INTERCOLLEGIATE ATHLETICS, *supra* note 102, at 6.

seems that college sports has become a panoply of rules and interpretations. The Knight Commission Report indicates that, "[s]ome rules have been developed to manage potential abuse in particular sports, in particular schools, or in response to particular circumstances of individual athletes. Whatever the origin of these regulations, the administration of intercollegiate athletics is now so over burdened with legalism and detail that the NCAA Manual more clearly resembles the IRS Code than it does a guide to action."²⁸⁰ Even the simplest of rules may taint the coach and trigger sanctions in his contract. The Knight Commission further requests that the NCAA applies itself to the task of simplifying and codifying complex NCAA rules and procedures.²⁸¹

Any man or woman on the street should be able to understand what the NCAA does, how it works, how it makes its decisions and, in particular, how it determines its sanctions. As it stands, not only can the average person not answer those questions, but very few presidents, athletic directors, coaches or student-athletes can predict what it is likely to do in any given circumstance.²⁸²

Therefore, the coach will need to protect himself with respect to this required "termination for cause" provision. The coach may want to require that in order for a termination for cause to exist, (1) that such rules violation be determined or adjudicated by the university, the NCAA or any other equivalent body and/or a court of law and (2) that the coach has committed a *MAJOR* violation, and did so knowingly or intentionally in violation of those rules.

There is a second category of just cause provisions calling for termination of the head coach if a member of the coaching staff commits a serious violation of NCAA rules providing that such acts were either under the control or direction of the head coach. In essence, the head coach becomes responsible for the acts of his coaching staff. While a principal/agent - respondeat superior relationship may exist, once again, the head coach needs to protect himself by specifying that the acts of assistants would have an effect on his employment only if the coach had actual knowledge of such violations or directed that such violations occur. The same should hold true with respect to student-athletes who also can violate the rules of the NCAA.

Finally, there are provisions for immediate termination in the event the head coach refuses to perform any of the duties which are reasonably re-

280. *Id.* at 8.

281. *Id.* at 29.

282. *Id.* at 30.

lated to his position and/or where such duties cannot be performed because of such disability or illness which would make the head coach unavailable to perform such duties. Termination clauses are normally accompanied by a clause exonerating the university from any further liability for salary benefits or other compensation after termination.

By their very nature, termination provisions should be negotiated between the parties. A statement of what constitutes grounds for termination is necessary. The coach will also want to establish some independent dispute resolution process such as a due process hearing, arbitration hearing or third party mediator for determining whether grounds for termination exist. If the university retains the right to make such determinations unilaterally, the coach's interests may be compromised.

The MCC Agreement defines just cause as:

- (1) deliberate and serious violations of the duties outlined in Section 3.02 of this Agreement or refusal or unwillingness to perform such duties in good faith and to the best of the Coaches abilities;
- (2) violations by the Coach of any of the other terms and conditions of this Agreement not remedied after ——— (——) days' written notice thereof to the employee;
- (3) situations in which the University determines that the best interests of the University and of its intercollegiate ——— program require that the Coach no longer retain the position of Coach of the University's ——— team initially assigned to him under this Agreement and the employee does not accept reassignment of responsibilities in accordance with the provisions of Section 3.01 above;
- (4) any conduct of the employee in violation of any criminal statute of moral turpitude;
- (5) a serious or intentional violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the ——— Conference or the NCAA, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including any serious violation which may result in the University being placed on probation by the ——— Conference or the NCAA and including any violation which may have occurred during prior employment of the employee at another NCAA member institution;
- (6) a serious or intentional violation of any law, rule, regulation, constitutional provision, bylaw or interpretation of the University, the ——— Conference or the NCAA by a member of the ——— coaching staff or any other person under the em-

ployee's supervision and direction, including student-athletes in the — program, which violation may, in the sole judgment of the University, reflect adversely upon the University or its athletic program, including any serious violation which may result in the University being placed on probation by the — Conference or the NCAA;

- (7) conduct of the employee seriously prejudicial to the best interests of the University or its athletic program or which violates the University's mission;
- (8) prolonged absence from duty without the consent of the employee's reporting superior; or
- (9) any cause adequate to sustain the termination of any other University coach of the Coach's classification.²⁸³

Another definition of "just cause" for termination purposes is as follows:

COACH'S employment being terminated by the Board of Directors of the University "for cause." Termination "for cause" shall be limited solely to termination by the action of the Board of Directors because of (a) gross negligence of Coach in the performance of his obligations under this Agreement; (b) the habitual intoxication or inexcusable repeated or prolonged absence from work of COACH; (c) the perpetration by Coach of a willful fraud against the University or its programs; (d) the failure of COACH to perform faithfully the duties of his office or the duties which are otherwise assigned to him by the Board of Directors of the University or its President, so long as such duties are consistent with the skills and experiences of COACH; (e) COACH's complicity in an immoral act which is inconsistent with the University's stated objectives and philosophies; or (f) the indictment of COACH for a felony as same is defined by the laws of the State of —. Termination "for cause" shall occur upon delivery to COACH of a notice of such action by the Board of Directors of the University, which notice shall specify the grounds for such termination. If COACH's employment is terminated "for cause," the University's only obligation to COACH shall be payment of the salary through the end of the month in which such termination occurs²⁸⁴

From a coach's perspective, specific acts constituting just cause for termination need to be strictly defined rather than couched in broad based statements. Such clauses as wilful fraud, moral turpitude or habitual intoxi-

283. Stoner & Nogay, *supra* note 29, at 75, 76.

284. Stoner, *supra* note 30, at 28.

cation may have a different meaning to different parties. Therefore, these terms should be specifically defined in terms of specific prohibited acts.

In negotiating termination for just cause provisions, the definition of "just cause" is factual in nature (such as moral turpitude, prejudicial conduct, prolonged absences, willful fraud, complicity in an immoral act, habitual intoxication, etc.) and, therefore, need to be determined by an impartial hearing examiner. A due process procedure should be established for purposes of an objective and impartial hearing to determine whether termination for just cause exists. Such procedure should include a statement of the charges against the coach, the right to a hearing, the opportunity for a coach to be present and to present a defense, the right to have an attorney present to advise the coach and to counsel and state his case and/or such other procedures as shall be governed by normal university grievance procedures.

Affording a coach some opportunity to a hearing and the right to challenge the university's charges for termination for cause is especially significant if a state institution is involved since the termination itself may be considered "state action" subject to due process provisions. In virtually all litigation in which an individual argues that his constitutional rights have been violated, the court can grant relief only if it finds that there has been state action, i.e., some sort of participation by a government entity sufficient to make the particular constitutional provision applicable.

When Earle Bruce was fired by Ohio State and filed a \$7.45 million lawsuit against the institution,²⁸⁵ one of his contentions was that his unlawful termination involved state action and, therefore, his constitutional rights were violated including denial of due process and equal protection of the law and deprivation of property without just compensation.²⁸⁶

An example of a due process procedure is as follows:

285. *Earl Bruce v. The Ohio State University*, Case No. 87 CV-11-7430; "Fired Cleveland State men's basketball coach Kevin Mackey plans to challenge his dismissal, claiming he was discriminated against because he is an alcoholic, the News-Herald of Willoughby, Ohio reported Thursday. Mackey's attorney, David Roth, filed a complaint with the Ohio Civil Rights Commission charging the school failed to provide him with reasonable accommodation for his chemical dependency. Mackey pleaded no contest last fall to charges of cocaine abuse and driving under the influence. Cleveland State fired Mackey six days after his July 13 arrest. 'We think we can defend our position,' said university spokesman Ed Mayer." *U.S.A. Today*, Mar. 29, 1991, at 1C, col. 1.

286. *Id.* From the pleadings of Bruce, paragraph 11, "The actions taken by the defendant, Edward H. Jennings and defendant, The Ohio University, acting under the color of state law and authority, deprived plaintiff of his contracted for and non-contracted for property rights and have further denied the plaintiff due process and equal protection, in violation of the laws of the State of Ohio and the United States of America, including the first Amendment, the Fifth Amendment and the Fourteenth Amendment."

- (a) Employment may be suspended for a period of time, without pay, or terminated, with immediate cessation of salary payments and fringe benefits, for cause. Cause for suspension or termination shall be a violation by a Coach, or a violation by a coach under that Coach's supervision of which that Coach was aware or was of a character or extent that the Coach should have been aware, of any of the rules, regulations or policies of the Big Ten Conference or the National Collegiate Athletic Association, as modified from time to time.
- (b) Prior to suspension or termination, an Employee (i) shall be provided with written notice of contemplated suspension or termination, a statement of the reasons and facts in support thereof and (ii) shall have five calendar days from receipt of such notice to deliver a written request for a hearing on the contemplated action. Written requests shall be delivered to the Office of the Chancellor. If no written request is received by the Chancellor as provided herein, a contemplated suspension or termination shall become final five calendar days following the coach's receipt of such notice.
- (c) Upon receipt of a written request for hearing, the Chancellor will appoint a three person hearing board, composed of two individuals from the Athletic board and one other University coach, to consider the matter and hear reasons for and against the contemplated action. The Coach has the right to appear before the hearing board, with a representative if he desires, to comment on the reasons given for the contemplated action and to present reasons against it. The hearing board shall not be bound by formal or technical rules of evidence. It will send written findings of fact and recommendations on the matter to the Chancellor or, if the Chancellor designates someone else, his designee. The Chancellor or his designee may seek counsel from the Athletic Board, shall consider the matter and notify, in writing, the Coach, the Director of Intercollegiate Athletics and the hearing board of the decision, which shall be final.²⁸⁷

287. University of Illinois Due Process Procedures as Part of Employment contract, Title, Supervision & Termination; Chronicle of Higher Education, February 1, 1989, at 29, 31; Chronicle of Higher Education, February 15, 1989, at 36; Gary Moss, the former men's basketball coach at Sam Houston State University has sued the university, the NCAA and several of their officials claiming that his rights under the Texas lawyer claimed that he has been fired without receiving a hearing as required for all state employees in Texas. The lawyer indicated the Sam Houston State University used the findings of the NCAA investigation, which he said does not meet due process standards under Texas law, to support the dismissal. Moss's attorney said that Moss should have been able to examine the evidence and confront his accusers. The law suit was ultimately settled

Finally, if the coach is dismissed for cause, the contract should state the effect therefor including cessation of compensation and fringe benefits as of the end of the month in which such termination occurs. The university will also want to indicate that it has no liability for loss of any collateral business opportunities or any other benefits, perquisites, or income resulting from the job as a result of said termination.

Murray Sperber in his book, *College Sports, Inc.*, indicates that Universities, even though they may have cause to dismiss a coach, and even though that coach may cause a NCAA investigation and ensuing penalties, prefer to settle their differences with a breaching coach rather than fire them outright.²⁸⁸ This is so, even though the university is absolved from its obligations if the coach violates NCAA rules:

When Mike White, after years of incurring NCAA sanctions and negative publicity for the University of Illinois, finally quit, the school rewarded him with \$300,000 settlement. Barry Switzer settled with the University of Oklahoma for \$225,000 during its recent troubles. After the NCAA put Texas A & M on probation for over twenty-five violations during Jackie Sherrill's regime, the school waved goodbye to this football coach and AD with a \$684,000 cash settlement and a house. And when Danny Ford resigned in 1990 at Clemson, with the NCAA cops at the gates, he was rewarded with a settlement that could top \$1.1 million.²⁸⁹

Because of the potential for litigation that may ensue after a coach is terminated for "just cause" and the coach's probable contesting of the facts therefor, the representatives of the coach and the university may want to simply ease the burden of a continued dispute. If there is a proceeding for just cause the university and the coach may mutually agree to a resignation format with the payment of some termination fee or liquidated damages.

when the university assigned Moss to a non-athletic post. The Chronicle of Higher Education, February 1, 1989, at 29, 31; The Chronicle of Higher Education, February 15, 1989, at 6.

288. M. SPERBER, *supra* note 5, at 165.

289. *Id.* at 155-66; *Gone But Not Forgotten*;

Clemson football coach Danny Ford resigned Thursday, but will continue to be compensated by the university. Under the terms of his resignation he will receive:

- \$190,000 a year for three years.

- Additional payments: For six months if he is hired elsewhere before Nov. 15, 1991; and two years if he is not hired before Nov. 15, 1992. there will be no payments beyond five years. As long as he is receiving payments, he will receive six football season tickets.

- He may stay in his home through May, 1990 and keep the automobile (van) he is using.

- The university will pay \$13,000 in mortgage interest on his farm in 1990, pay the balance of the mortgage, \$100,000, and maintain health insurance for Ford and his family through Dec. 31, 1990.

Gone But Not Forgotten, U.S.A. Today, Jan. 19, 1990, at 8C, col. —.

2. Termination Without Cause or for Any Other Reason

The coach's contract will also reserve to the university the right to terminate the coach's employment for reasons other than those set forth in the termination for "just cause" provision or for no reason at all. This termination provision is more concerned with defining the university's financial liability than the reasons for termination. Thus, when the coach is terminated without cause, the issue centers on the determination of the amount of damages that the coach will receive, the nature of the damages and the method of payment. A number of options are available, including:

1. A negotiated stated amount.
2. The coach's base salary or other compensation items for the remainder of the contract term.
3. The percentage of the base salary and other compensation packages for the remainder of the agreement.
4. De-escalating amount depending upon the year of the agreement and the termination therefor.
5. A lump sum settlement.

What benefits the coach will receive should be strictly defined in the contract upon a premature termination. If liquidated damages are agreed to, the university will want a provision indicating it will not be liable for the loss of any collateral benefits, perquisites or income resulting from activities such as but not limited to camps, clinics, media appearances, apparel, shoe contracts, consulting relationship or from any other sources that may ensue as a result of the university's termination of this agreement without cause or because of the coach's position as such. The liquidated damage provision will also indicate that said damages are bargained for damages and constitute a reasonable and adequate consideration to the coach and shall not be construed to be in the nature of a penalty.

Another issue is the coach's obligation to mitigate damages, i.e., obtaining reasonably comparable employment or other employment for purposes of offsetting the damages agreed to be paid by the university. If other employment is obtained, a question will arise as to whether or not the liquidated damages agreed to be paid by the university ceases or the university's obligation is modified to be the difference between the amount the university agreed to pay and the amount received from the new employer, if any.

Most universities recognize their continuing liability under the contract and continue to pay the coach throughout the contract term or buy-out the contract for a lump sum. It has been suggested that a lump sum buy-out at the time of the termination, based on the present value of the future payments to become due, is the proper measure of damages in such a situation rather than the installment method. The theory is that since the breach is

complete upon contract termination, complete damages are then due as well. When negotiating the buy-out or the liquidated damages provisions of a termination without just cause, consideration should also be given to continuation of some collateral benefits such as continued health insurance for a time certain and the payment of moving expenses. An example of termination without cause provision favorable to the coach is as follows:

Termination Without Cause. In the event of the Employee's termination by the University for reasons other than as previously set forth in this Agreement during the term of this Agreement, including any extensions therefore, the Employee shall be entitled to the remainder of any Annual Salary plus the University's contribution to TIAA-CREF (retirement plan) owed under and pursuant to the terms of this Agreement plus 50% of the then scheduled radio and T.V. income as hereinbefore referenced to be paid on the same date as if Employee was still employed under and pursuant to this Agreement for the term under which said amount shall be paid. In addition, the University shall continue to provide Employee after such termination with such medical and health insurance benefits for the balance of the term of this Agreement, including any extensions therefor or until Employee obtains other full-time employment with replacement policies whichever is the lesser period. It is the intention of this paragraph that in the event Employee should be terminated without cause that Employee would continue to receive the compensation and benefits as herein specified for the full remaining term of this Agreement without any obligation to mitigate damages and, in addition to compensation he may be receiving from other employment, even if the employment is similar to the employment as hereinstated. In the event Employee is terminated without cause, Employee shall be entitled to conduct the summer camp and receive all benefits therefrom pursuant to paragraph 8 of this Agreement during the summer subsequent to said termination. In no case shall the University be liable for loss of any collateral business opportunity or other benefits, perquisites or income from any sources that may ensue as a result of the University's termination of this Agreement.²⁹⁰

There are a number of celebrated termination cases that need to be reviewed.

On November 20, 1987, Earl Bruce was fired by Ohio State University. He filed a \$7.45 million lawsuit against the institution and its president.²⁹¹

290. See *supra* note 179.

291. *Earl Bruce v. The Ohio State University and Edward H. Jennings, President and Edward H. Jennings Individually*; Franklin county Ohio, Case N. 87-CV11-7430; N. Y. Times, Nov.

Bruce charged breach of contract, wrongful dismissal and slander.²⁹² Because the termination involved state action, constitutional law violations were also alleged, including denial of due process and equal protection and the deprivation of property without just compensation.²⁹³ In the *ad damnum* clause to Bruce's complaint, the following damages were requested:

- A. \$448,800 for breach of contract (salary and package).
- B. \$2 million for violation of Bruce's constitutional rights.
- C. \$5 million in compensation and punitive damages.²⁹⁴

It should be noted that Bruce's contract specifically stated that the university was not liable for consequential damages of any kind in the event of early termination.²⁹⁵ The university only contractual obligation was to pay salary and employee benefits, subject to the usual offset.²⁹⁶ The case was ultimately settled for \$471,000.²⁹⁷

In *Yukica v. Leland*,²⁹⁸ in December of 1986, Joe Yukica, prevented Dartmouth College's attempt to fire him when he obtained a temporary court order restraining the athletic director from hiring a replacement coach.²⁹⁹ The coach argued that he was not given 12-months' notice of termination as required by his contract. Yukica's contract had been renewed in the summer of 1986 and extended to June of 1987. In November, after his second straight losing season, Dartmouth athletic director, Ted Leland, told Yukica that he was being relieved of his coaching duties and would be reassigned elsewhere in the college.³⁰⁰ In December of 1986, the coach filed suit. In January 1987, a settlement was reached allowing Yukica to remain as coach through the 1987 season.³⁰¹ The settlement called for Yukica to get roughly a \$1,700.00 pay increase, \$57,511 in 1986, retention of the use of a car and house while serving as coach, and \$70,000 in settlement of his claims.³⁰²

17, 1987, at D31, col. 4; Nov. 28, 1987, at 43, col. 1; The Chronicle of Higher Education, Dec. 2, 1987, at A37, col. 2.

292. Chronicle of Higher Education, Dec. 2, 1987, at 37, col. 2.

293. *Earl Bruce*, Case No. 87 CV-11-7430, complaint at 6.

294. *Id.* at 89.

295. *Earl Bruce*, Case No. 87 CV-11-7430, Exhibit A at 3.

296. *Id.*

297. *Id.*

298. *Yukica v. Leland*, Farrel, Dartmouth; Chronicle of Higher Education, Nov. 19, 1986, at 39, col. 1; N.Y. Times, Dec. 3, 1985, at B20, col. 1.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* An out of court settlement was reached by former University of Wisconsin-Stevens Point coach, D.J. LeRoy, who was fired following a scandal involving ineligible players. LeRoy

Another celebrated case is that of Ben Lindsey, former head basketball coach at the University of Arizona.³⁰³ Lindsey brought various actions against the University of Arizona for breach of contract and breach of the implied covenant of good faith and fair dealing and for loss of future earning capacity.³⁰⁴ In addition, he sued Cedric Dempsey, former athletic director and Henry Koffler, President of the University for breach of contract, fraud, intentional interference with contractual relations and intentional infliction of emotional distress.³⁰⁵ In *Lindsey*, the court affirmed a judgment in favor of Lindsey for \$215,000 for loss of employment³⁰⁶ for three years, and an additional \$91,312 for attorney's fees. However, the court also vacated a judgment insofar as an award of \$480,000 for loss of future earning capacity.³⁰⁷ With respect to this aspect of the case, Lindsey maintained that he should receive damages because of the difficulty that he would have and would, in the future, encounter in obtaining employment as a coach in view of his premature termination as coach of the University of Arizona.³⁰⁸ The court indicated that damages for diminution of future earning power capacity are not recoverable in action for breach of an employment contract.³⁰⁹ The jury, the court held, could do nothing more than engage in speculation and conjecture as to the effect Lindsey's termination would have on his future earning capacity.³¹⁰

Probably the most celebrated case is the demise of former North Carolina State head basketball coach Jim Valvano. With the release of Personal

was fired a year ago when the school was forced to forfeit its 12 victories in 1987, the Wisconsin State University Conference title and a share of the NAIA Division II championship because two players were ineligible. The settlement absolves LeRoy of any responsibility regarding the athletic eligibility of the two players. It also call for the State to pay him \$40,000. Said LeRoy, "My primary objectives since last May have been to obtain a respect to the loss of the 1987 football season and the national co-championship. I consider this settlement as a total vindication." LeRoy is now a coach at Coe Collège in Cedar Rapids, Iowa; *The Sporting News*, May 15, 1989, at 49, col. 1. Bob Wade, former University of Maryland basketball coach, was the subject of an NCAA investigation involving allegations that Wade gave improper rides to class to a player. Wade misstated this role to investigators thereafter. Wade helped players accumulate frequent flyer bonus points from airline tickets purchased by the Athletic Department and received small sums of cash on occasions. For his resignation, Wade received \$120,000 cash settlement which amounted to about 60% of Wade's salary for the remaining two years of his five year contract and the settlement further calls for the University foundation to buy his house near campus and to pay \$5,000 towards moving expenses. *Wash. Post*, May 13, 1989, at A1, A6, col. 1, col.2.

303. *Lindsey v. University of Arizona*, 157 Ariz. 48, 754 P.2d 1152 (Ariz. App. 1987).

304. *Id.* at 1152.

305. *Id.*

306. *Id.* at 1157, 1159.

307. *Id.* at 1158.

308. *Id.* at 1157, 1158.

309. *Id.* at 1158.

310. *Id.*

Fouls by Peter Golenbock,³¹¹ the announcement by the NCAA that North Carolina State was to be placed on probation for two years because of players selling shoes and complimentary tickets and the announcement by former Valvano player, Charles Shackleford, currently of the New Jersey Nets, that he accepted loans while playing at State, the fate of Valvano had already been determined.³¹² Evidently, Valvano's contract contained both a buy out clause and a termination provision. Valvano was required to pay \$500,000 if he left the university and the university was required to pay \$500,000 if Valvano was prematurely terminated.³¹³ Valvano even offered to coach the basketball team for \$1 (presumably to preserve his lucrative outside income sources and the name position of head coach) for the ensuing season.³¹⁴ An out-of-court settlement was reached between Valvano and the university. He agreed to leave the university voluntarily and not to sue the school in exchange for \$238,000 (\$26,509.24 for salary payments through May 15, 1990 and \$212,000 buy out for the remaining term of his contract).³¹⁵ In addition, Valvano expected to receive \$375,000 from the university's booster club, The Wolf-Pack Club, in the form of a \$250,000 annuity and \$125,000 under a "loss revenue provision".³¹⁶

K. Buy Out - Release Provisions

Generally, an employer cannot obtain specific performance of a personal service contract. That is, neither the employer nor the courts can require a coach to work even if the contract specifically provides for such services. Courts are reluctant to issue injunctions compelling employment because of the inherent logistical problems in effectively supervising and enforcing such decrees. Courts have historically viewed this form of affirmative relief as violating public policy and the Thirteenth Amendment of the United States Constitution, as it subjects individuals to a form of involuntary servitude.

With respect to a contract jumping coach, it would appear, at least in theory, that the university could bring an action for monetary damages against the coach in breach of contract. In such cases the recoverable damages are normally measured by the cost of the employer in obtaining equivalent services elsewhere, plus consequential damages. Some cases in-

311. P. GOLENBOCK, *PERSONAL FOULS* (1989).

312. L.A. Times, July 26, 1990, at 16C, col. 6.

313. *Id.*

314. *Id.*

315. *Buyout Accord Reached By Valvano, N.C. State*, Sports Industry News, Apr. 13, 1990, at 111; see also, The Wash. Post, Apr. 8, 1990, at C1, col. —.

316. *Id.*

dicating that in assessing such damages, the "market value" of the lost services must be measured against that of the substitute services procured by the employer to remedy the breach.

These rules sound reasonable but they may be quite difficult to apply, particularly for an institution contemplating suit against a departed coach. First, measuring the 'value' of one coach's services compared to another's is an inherently difficult problem unlikely to provide an easy answer. Second, due to the intense publicity involved, to engage in litigation with the departing coach can prolong the parties' bad feelings and put a cloud over the institution's entire athletic program. This adverse publicity can easily continue for years while a complex case is pending in court. Third, while some damages, such as the expenses of searching out a new coach, are easily ascertainable, the complex compensation arrangements under which most coaches operate, where base salary is but one element in the compensation "package," could make it extremely difficult for a jury to calculate exactly what it has cost the institution to obtain the services of the new coach."³¹⁷

As a result, most institutions allow their restless or ambitious coaches to leave gracefully without further legal recourse.

Recently, however, universities are imposing buy out provisions on coaches who wish to depart early. Normally, the buy out provision will be for a predetermined lump sum or an amount predicated on a de-escalating scale, depending upon when the coach terminates. Washington State University seems to be an anomaly in the field of enforcement of coach's contracts. It is alleged that the university is the first institution of higher education to sue a jumping coach and to generate a settlement therefor.³¹⁸ With two years remaining on his contract, Warren Powers, the then head football coach, left for better pastures for the same job at the University of Missouri.³¹⁹ Washington State University sued and ultimately ended up with a \$55,000 settlement.³²⁰ In 1989, Washington State University was, once again, faced with a jumping coach.³²¹ Dennis Erickson decided to depart for Miami, as a result therefor, ended up paying the university \$150,000 to settle his contract.

Gene Keady, Purdue head basketball coach, was recently offered the job at Arizona State University for a greater compensation package than he had

317. Graves, *supra* note 27, at 548.

318. M. SPERBER, *supra* note 5, at 165.

319. *Id.*

320. *Id.*

321. The Sporting News, Mar. 20, 1989, at 26.

at Purdue.³²² However, his Purdue contract had a buy out provision of \$200,000.³²³ Keady chose to stay at Purdue rather than expending the required buy out figure, or asking his new employer to incur the obligation to release him of his prior contractual obligations.³²⁴

Some examples of a buy out-release provision are as follows:

If at any time during the term of this agreement, coach shall submit his resignation as head basketball coach for any reason other than disability due to illness or accident, then he shall pay to the university the sum of \$—— to compensate the university for injury suffered by reason of a breach of this contract resulting from such resignation, it being very difficult to ascertain or estimate the entire exact cost, damage or injury which the university as employer may sustain by reason of such breach. The parties agree that such sum is reasonable and appropriate compensation for the injuries suffered by the university under the same circumstances and that it is not a penalty.³²⁵

Another example of a buy out release provision is as follows:

Voluntary Termination by Coach. In the event Coach voluntarily terminates his employment with the University during the term of this Agreement, the University shall be discharged of any and all further obligations of this Agreement with respect to the obligation to pay and/or provide the benefits as herein specified to Coach. In the event the Coach desires to voluntarily terminate this Employment Agreement and take another position as a Division One Coach, Coach will be required to buy-out the terms of this Agreement and pay the University according and pursuant to the following schedule:

- a. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the first year of employment hereunder, Coach shall pay to the University 80% of the Annual Salary for the remaining term of this Agreement.
- b. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the second year of employment hereunder, Coach shall pay to the University 60% of the Annual Salary for the remaining term of the Agreement.

322. Sports Industry News, Mar. 24, 1989, at Data Page.

323. *Id.*

324. *Id.*

325. Stoner, *supra* note 30, at 34.

- c. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the third year of employment hereunder, Coach shall pay to the University 40% of the Annual Salary for the remaining term of the Agreement.
- d. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the fourth year of employment hereunder, Coach shall pay to the University 20% of the Annual Salary for the remaining term of the Agreement.
- e. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the fifth year of employment hereunder, Coach no buy-out shall be required.

At the sole option and discretion of the Coach, said buy out payments may be made in lump-sum within ten (10) days after notification of voluntary termination and/or on May 1st of each year of the term of this Agreement with respect to the amount owed by Coach. It is understood that this buy-out provision shall only apply to the original term of this Agreement and shall not be included and/or apply to any extensions of the original term hereof.³²⁶

Some coaches will take a job with specific language in their contract that they have the right to terminate their position with the university in the event a specific named school offers a position of head coach.³²⁷ For instance, it was rumored that when Lou Holtz signed a contract with the Minnesota Gopher football team, he had a contract clause that would permit him to terminate that contract in the event he was offered the head football coaching job at Notre Dame University. In essence then, the contract advisor is negotiating an opt out clause wherein the coach is permitted to terminate his employment and obligations pursuant to the employment contract without any further obligation to the university on a condition subsequent basis if a specific job was offered to the coach during the term of the employment contract with the university.

L. Support of Program

The coach will want a covenant and commitment requiring the university to provide academic, economic and other forms of support to the athletic program at least equal to the level of support given to other athletic programs by other universities in the athletic conference to which the uni-

326. *Id.*

327. M. SPERBER, *supra* note 5, at 167.

versity is a member. Included in academic support would be: (1) academic counselors, (2) tutoring, and (3) other educational services. Included in economic support would be: (1) maintenance and improvement of physical facilities, (i.e., office facilities, locker room facility, dining and dormitory facilities as well as training and exercise facilities), (2) budgets sufficient to hire and retain the maximum number of assistant coaches, (3) budgets necessary to cover expenses associated with first class recruiting, (4) awarding the maximum number of scholarships to athletes permissible under NCAA rules. A coach will also want to be involved in the scheduling of games subject to final authority being reposed in the university's athletic director.

M. Tenure

Normally, only ordinary faculty members can be given tenure. Tenure is only granted in a specific academic capacity and a faculty member could not achieve tenure in connection with his administration or athletic department duties.

At the January, 1990, NCAA Convention, Executive Director Dick Schultz suggested that schools give tenure to coaches. In any discussion of tenure for coaches, the issue of job security versus job flexibility must be weighed.³²⁸ Therefore, under present circumstances, the university will want a clause indicating and confirming that the position of head coach of an athletic team is not a tenured track position, and will not ultimately lead to tenure.

N. Scheduling and Assistant Coaches

There will be some negotiation between the university and the coach with respect to the coach's authority relative to the hiring and firing of assistant coaches and the scheduling and rescheduling of games with respect to the university's program. While the coach will request control over the hiring and firing of his own assistants and the scheduling of the games, the athletic director will probably want the right of approval or the right to participate in the scheduling or hiring process itself.

O. Confidentiality

To the extent permitted by law and not prohibited by state open-record laws or freedom of information acts, the university and coach will want the

328. *Coaches Not United on Tenure*, San Francisco Chronicle, Jan. 10, 1990, at D8, col. —. The following are cases related to the tenure issue for college coaches: *see generally* Hanlon v. Providence College, 615 F.2d 535 (1st Cir. 1980); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

terms and conditions of the employment arrangements to be kept confidential. Each party will agree to refrain from disclosing the terms and conditions of the employment agreement without the prior written consent of the other. Unless, of course, disclosure is required by applicable state law. In addition, the parties will probably want a confidentiality agreement concerning disagreement and non-disclosure to third parties and the submission of any disagreements to some form of arbitration procedure.

Any public announcement with regards to the employment contract shall be jointly agreed to concerning the agreement itself and/or any extensions or modifications thereof.

The university will also want the coach, upon termination, to immediately cause certain information developed as a result of the position of head coach to be delivered to the university as the sole and confidential property of the university upon such termination. Such materials, without limitation, may include personnel records, recruiting records, team information, films, statistics, any other memoranda or data furnished to the coach by the university or developed by the coach on behalf of the university as a result of the position of coach.

P. Arbitration

During the course of the contract period there may be disputes between the university and coach arising out of or concerning the scope, interpretation or provisions of the employment contract. Obviously, if there is a dispute with respect to the contract either party has their legal remedies, including injunctions against further continued breach, specific performance, if any, or damages arising out of such breaches. Another alternative, other than utilization of the courts, is arbitration or some other form of dispute resolution procedure where such disputes are submitted to an impartial third party. Obviously, any such clause would need to define the disputes to be so submitted, the party to act as the objective third party arbitrator, the rules under which the arbitration would be conducted and the agreement that the decision of the arbitrator shall be binding without further ability to appeal. Although the utilization of the courts may be a leverage factor, a dispute resolution device may be more efficient, cost saving, time saving and ultimately equitable for both parties.

III. CONCLUSION

The Knight Commission characterizes the power coach as often enjoying greater recognition throughout the state than most elected officials,

and as the chief operating officer of a multimillion dollar business.³²⁹ Indeed, college sports is a business, but so is the relationship between a university and its coach a business and contractual package. As such, that relationship should be treated in the strictest contractual and legal sense. Kevin O'Neill, Marquette University Basketball Coach, in a speech at Marquette University Law School, on March 26, 1991 gave some important perspectives to the real world of college coaching and contracts. O'Neill suggested:

1. Get a lawyer.
2. Get all compensation terms in writing, nothing oral. Hand shake deals are a custom of the past.
3. The day of the long-term contract is gone. Three to five year stays will become normal.
4. Don't trust anyone. Contract negotiations is a business deal and ultimately adversarial.
5. Because violation of NCAA Rules can mean an end to your contract and maybe your career, document all activities on a daily basis by the use of a diary.
6. Limit your liability with respect to the acts of other, especially student-athletes and assistant coaches.
7. College athletics is big business and universities should not be limiting the outside sources of income of coaches.
8. Plan for termination.³³⁰

Yes, job volatility and movement in the coaching industry is the main concern and topic of most coaches today. On April 3, 1989, Jud Heathcote, head basketball coach at Michigan State University and outgoing President of the National Association of Basketball Coaches, announced that a fund would be created for the rehabilitation and counselling of those coaches who were dismissed. He stated that \$2,000.00 will be made available to any coach or member of his family for use, for counselling, self-rehabilitation or career guidance.³³¹ It appears that lawyers will have a more heavy-handed role in the contractual relationships between universities and coaches. Not only in the contractual stage, but in the legal adversity in negotiated settlements that seem to highlight those events that terminate the relationship between universities and their coaches.

329. THE KNIGHT FOUNDATION COMMISSION REPORT ON INTERCOLLEGIATE ATHLETICS, *supra* note 102, at 5.

330. Remarks by Kevin O'Neil, Marquette University Men's Head Basketball Coach, (Mar. 26, 1991).

331. *Coaches Organize Fund For the Fired*, U.S.A. Today, Apr. 5, 1989, at 2C, col. —.